No. 18-481	
Title:	**Food Marketing Institute, Petitioner** **v.** **Argus Leader Media, dba Argus Leader**
Docketed:	October 15, 2018
Linked with 18A146	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(17-1346)
Decision Date:	May 8, 2018
Rehearing Denied:	July 13, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 07 2018	Application (18A146) to recall and stay mandate pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Gorsuch. **Main Document** **Lower Court Orders/Opinions** **Proof of Service**
Aug 09 2018	UPON CONSIDERATION of the application of counsel for the applicant, IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 17-1346, is hereby recalled and stayed pending further order of the undersigned or of the Court. It is further ordered that a response to the application be filed on or before Thursday, August 16, 2018, by 4 p.m. The reply, if any, is to be filed by 4 p.m., Tuesday, August 21, 2018.
Aug 16 2018	Response to application from respondent Argus Leader Media, D/B/A Argus Leader filed. **Main Document** **Proof of Service**
Aug 21 2018	Reply of applicant Food Marketing Institute filed. **Reply** **Proof of Service**
Aug 29 2018	Application (18A146) referred to the Court.

Aug 29 2018	Application (18A146) granted by the Court. The application to recall and stay the mandate, presented to Justice Gorsuch and by him referred to the Court, is granted, and the mandate of the United States Court of Appeals for the Eighth Circuit in case No. 17-1346 is recalled and stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Ginsburg, Justice Sotomayor, and Justice Kagan would deny the application.
Oct 11 2018	Petition for a writ of certiorari filed. (Response due November 14, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Oct 25 2018	Motion to extend the time to file a response from November 14, 2018 to December 14, 2018, submitted to The Clerk. **Main Document**
Oct 29 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 14, 2018.
Nov 14 2018	Brief amicus curiae of Retail Litigation Center, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 14 2018	Brief amici curiae of Alliance of Marine Mammal Parks & Aquariums, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 14 2018	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 14 2018	Brief amici curiae of National Association of Convenience Stores, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 20 2018	Consent to change of Respondent's counsel of record of Argus Leader Media, d/b/a Argus Leader not accepted for filing. (November 27, 2018 – Document not of the type that is to be filed electronically)
Dec 14 2018	Brief of respondent Argus Leader Media, d/b/a Argus Leader in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 24 2018	Reply of petitioner Food Marketing Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 26 2018	DISTRIBUTED for Conference of 1/11/2019.
Jan 11 2019	Petition GRANTED.

Jan 30 2019	Blanket Consent filed by Respondent, Argus Leader Media, d/b/a Argus Leader. **Blanket Consent** **Proof of Service**
Jan 31 2019	Blanket Consent filed by Petitioner, Food Marketing Institute. **Blanket Consent** **Proof of Service**
Feb 11 2019	SET FOR ARGUMENT on Monday, April 22, 2019
Feb 15 2019	Brief of petitioner Food Marketing Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 15 2019	Joint appendix filed (2 vols). **Main Document** **Other** **Proof of Service**
Feb 21 2019	Brief amici curiae of National Association of Convenience Stores, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 22 2019	Brief amicus curiae of United States filed. **Main Document** **Proof of Service**
Feb 22 2019	Brief amicus curiae of Retail Litigation Center, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 22 2019	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 22 2019	Brief amici curiae of Alliance of Marine Mammal Parks & Aquariums, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 18 2019	Brief of respondent Argus Leader Media, d/b/a Argus Leader filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 8th Circuit.
Mar 22 2019	Brief amici curiae of Cause of Action Institute, et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 25 2019	Brief amicus curiae of New Hampshire Right to Life filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 25 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Main Document** **Proof of Service**
Mar 25 2019	Brief amici curiae of Electronic Privacy Information Center, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Brief amici curiae of Public Citizen, Center for Science in the Public Interest, Collaboration for Research Integrity filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Brief amici curiae of Freedom of Information Act and First Amendment Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Brief amici curiae of Reporters Committee for Freedom of the Press & 36 Media Organizations filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Brief amici curiae of Detention Watch Network, Human Rights Defense Center and Prison Policy Initiative filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Affidavit of Service of BioScience Advisors, Inc. not accepted for filing. (Corrected version submitted).
Mar 25 2019	Corrected Affidavit of Service filed with respect to amicus curiae brief of BioScience Advisors, Inc. (March29, 2019). **Main Document**
Mar 25 2019	Brief amicus curiae of BioScience Advisors, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count**
Mar 25 2019	Brief amici curiae of AI Now Institute at New York University, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Brief amicus curiae of American Small Business League filed. (To be Reprinted) (Distributed)
Mar 25 2019	Brief amicus curiae of American Small Business League filed. (April 16, 2019) (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 27 2019	Record received from the U.S.D.C. Dist. of South Dakota Southern Division. (1 Box).
Apr 01 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 05 2019	Reply of petitioner Food Marketing Institute filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 22 2019	Argued. For petitioner: Evan A. Young, Austin, Tex.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae). For respondent: Robert M. Loeb, Washington, D. C.
Jun 24 2019	Judgment REVERSED and case REMANDED. Gorsuch, J., delivered the **opinion** of the Court, in which Roberts, C. J., and Thomas, Alito, Kagan, and Kavanaugh, JJ., joined. Breyer, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg and Sotomayor, JJ., joined.

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No. 18-____

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has not yet addressed Exemption 4 of the Freedom of Information Act, which protects from disclosure all "confidential" private-sector "commercial or financial information" within the Government's possession. 5 U.S.C. § 552(b)(4). The Circuits, however, have adopted a definition of "confidential" that departs from the term's ordinary meaning, holding that this exemption applies only if disclosure is "likely * * * to cause substantial harm to the competitive position of" the source of the information. *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The D.C. Circuit fashioned this atextual test from its own sense of FOIA's purposes based on witness testimony in a legislative hearing about a predecessor bill from a prior Congress. The amorphous test has produced at least five different circuit splits as the Circuits have grappled with what constitutes a likelihood of substantial competitive harm. The questions presented are:

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus requiring the Government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure—which would resolve at least five circuit splits?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the requested information could be potentially useful to a competitor (as the First and Tenth Circuits have held), or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share (as the Ninth and D.C. Circuits have held, and as the Eighth Circuit required here)?

PARTIES TO THE PROCEEDING BELOW

Petitioner Food Marketing Institute was an intervenor-defendant in the U.S. District Court for the District of South Dakota and the appellant in the U.S. Court of Appeals for the Eighth Circuit.

The U.S. Department of Agriculture was the defendant in the district court but was not a party to the Eighth Circuit appeal.

Respondent Argus Leader Media was the plaintiff in the district court and the appellee in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Food Marketing Institute (FMI) is a voluntary trade organization, with headquarters in Arlington, Virginia, that represents almost 1,000 retail and wholesale food sales members operating nearly 33,000 retail food stores across the United States and in several foreign countries. FMI has no parent corporation, and no publicly held corporation has an ownership interest in FMI.

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IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Food Marketing Institute respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (App. A) is reported as *Argus Leader Media* v. *U.S. Department of Agriculture*, 889 F.3d 914 (8th Cir. 2018). The court of appeals' judgment (App. B) and order denying rehearing *en banc* (App. O) are unreported.

The district court's memorandum opinion and order (App. C) is reported as *Argus Leader Media* v. *U.S. Department of Agriculture*, 224 F. Supp. 3d 827 (D.S.D. 2016). The district court's judgment (App. D) and order granting FMI's motion to intervene (App. J) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May

8, 2018. The court denied rehearing *en banc* on July 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act, 5 U.S.C. § 552, provides:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (8)(A) An agency shall—
>
> (i) withhold information under this section only if—
>
> (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption describe in subsection (b); ***
>
> * * *
>
> (b) This section does not apply to matters that are—
>
> * * *
>
> (4) trade secrets and confidential or financial information obtained from a person and privileged or confidential;
>
> * * *.

5 U.S.C. § 552(a)(8)(A)(i)(I), (b)(4).

PRELIMINARY STATEMENT

The private sector must disclose substantial amounts of information to the Government, including the information at issue here—redemption data from retailers participating in the Supplemental Nutrition Assistance Program, or SNAP. The Freedom of Information Act, however, protects significant portions of private-sector information from public release. This case turns exclusively on FOIA Exemption 4, which bars disclosure of "trade

secrets and commercial or financial information" that is "confidential." 5 U.S.C. § 552(b)(4). Participating SNAP retailers jealously guard store-level SNAP data from competitors and hold such data highly confidential. Unable to obtain this confidential data from any public source, Argus Leader sought to obtain it through FOIA.

But rather than give "confidential" its ordinary meaning, the Eighth Circuit followed a test the D.C. Circuit created based on a selective reading of legislative history. According to the court of appeals, "confidential" means that the release of the information would "likely * * * 'cause substantial harm to the competitive position'" of those whose data is disclosed. App., *infra*, 3a (quoting a series of Eighth Circuit cases that ultimately trace to *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

The Eighth Circuit is hardly alone in having abandoned FOIA's plain text and permanently deferred instead to *National Parks*. But that D.C. Circuit decision came from a very different era of statutory construction. *National Parks* made no pretense of focusing on the statutory text. It instead decided that, despite its plain text, Exemption 4 did not encompass all confidential financial and commercial information obtained from a person, then supported that assumption with snippets of legislative history—witness testimony at hearings on a predecessor bill from a prior Congress. The court thus transformed the common, broad ordinary meaning of "confidential" into the far narrower and more fact-bound concept involving whether release would "substantial[ly]" harm a "competitive position." 498 F.2d at 770.

This Court has not yet construed Exemption 4, but the plain-text approach to FOIA that the Court has repeatedly employed cannot coexist with *National Parks*. The *National Parks* definition of "confidential" directly

conflicts with this Court's ordinary-meaning construction of that very statutory term in another nearby FOIA exemption. See *U.S. Dep't of Justice* v. *Landano*, 508 U.S. 165, 173 (1993) (giving "confidential" in FOIA Exemption 7 its ordinary meaning based on dictionary definitions).

The Circuits' fidelity to this amorphous, judicially-created test from *National Parks* has spawned a spate of circuit splits, as the Circuits repeatedly disagree about the elements required to show a likelihood of substantial competitive harm. See *infra* pp. 24-30. This substantial-competitive-harm test requires FOIA requesters, the Government, the parties whose data will be revealed, and the courts to expend considerable energy speculating about the future effects of releasing a particular set of data. Yet the test still generates disparate outcomes among (and within) the Circuits despite the vast resources required to implement it.

This Court granted petitioner's application to recall the Eighth Circuit's mandate and stay its judgment. App., *infra*, 82a. That stay prevented this case from becoming moot and depriving the Court of an opportunity to—at long last—consider Exemption 4's text. The very fact that circuit splits have resulted from *National Parks* illustrates why the first question presented warrants consideration: the nebulous and erroneous substantial-competitive-harm test is itself the root of those splits. But even if the Court retains that test, the resulting division among the Circuits still requires resolution of the second question presented and justifies reversal here. Either way, the Court should grant certiorari and eliminate the vast uncertainty that envelops FOIA Exemption 4.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Supplemental Nutrition Assistance Program (SNAP)—formerly, the Food Stamp Program—is a

federal program that provides nutritious food to low-income families through normal economic channels. 7 U.S.C. § 2011. USDA receives and maintains a record when a SNAP recipient makes an eligible purchase at a participating store. App., *infra*, 2a. The program's scope is considerable. In June 2018 alone, over 39 million individuals received SNAP benefits.[1]

USDA releases monthly compilations of SNAP redemption data. Anyone can view national, state, and even congressional-district level SNAP costs on USDA's website.[2] But USDA does not disclose data regarding the amount of SNAP redemptions at individual stores, and retailers have participated in the program with the understanding that store-level data would be kept confidential. App., *infra*, 88-89a.

B. Respondent Argus Leader is a newspaper in Sioux Falls, South Dakota. In 2011, an Argus Leader reporter filed a FOIA request for SNAP data. App., *infra*, 25a. For each SNAP retailer nationwide, Argus Leader requested the store identifier, name, address, store type, and total SNAP sales on an annual sales basis for 2005 to 2010. *Ibid.* USDA timely released most of the requested information but withheld the store-level SNAP sales data. *Id.* at 26a.

II. Proceedings Below

A. The lawsuit and initial litigation

After USDA refused to provide store-level data, Argus Leader brought suit in the U.S. District Court for the District of South Dakota. App., *infra*, 10a. USDA asserted several FOIA exemptions, including Exemption 4. The district court granted summary judgment for USDA

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[1] USDA, Supplemental Nutrition Assistance Program (Sep. 24, 2018), https://www.fns.usda.gov/sites/default/files/pd/34SNAPmonthly.pdf.

[2] SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited Oct. 1, 2018).

based on Exemption 3—that the information was exempted from disclosure by statute. *Ibid.* The Eighth Circuit reversed as to Exemption 3. *Ibid.* Exemption 3 plays no further role in this case.

B. Proceedings in the district court

1. On remand, USDA again pressed its argument that FOIA's Exemption 4 protects store-level SNAP sales data. App., *infra*, 10a. That provision exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit has adopted the D.C. Circuit's approach to whether information is "confidential" from *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under that test, Exemption 4's applicability turns on whether disclosure would likely cause substantial competitive harm. App., *infra*, at 16a. After denying USDA's summary-judgment motion, *id.* at 10a, the district court held a two-day bench trial to assess the competitive harms associated with releasing the requested data, *id.* at 11-13a & 87a.

USDA presented multiple industry witnesses who testified that retailers consistently and strenuously protect the requested information from their competitors. App., *infra*, 11a-12a & 88a-89a.[3] Competition in the food-retail industry is fierce and profit margins are narrow, forcing retailers to rely on high sales volumes for profitability. *Id.* at 12a & 17a. The witnesses explained how releasing store-level data would directly threaten stores' competitive positions.[4] Argus Leader presented no fact witnesses

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[3] Witnesses came from a supermarket chain, a large department store, a wholesale grocer, a convenience store, and the National Grocers Association. App., *infra*, 11a-12a.

[4] For example, USDA's witnesses testified that with this information, rivals could target an existing store's customers, decide where to build

at trial.

Expert testimony corroborated the fact witnesses' concerns. USDA's expert was Bruce Kondracki, the vice president of a consumer-research firm that performs market analysis, site location, and forecasting research in the food industry. App., *infra*, 13a. Kondracki explained that if retailers' SNAP data were released, that data could be used to target an existing store's customers, and to improve the accuracy of model forecasts used by competitor stores to determine where to add locations. *Ibid.* Argus Leader presented two expert witnesses, neither of whom works in the food-retail industry. These witnesses acknowledged the competitive nature of the industry, but maintained that the release of store-level SNAP data was likely to have only limited competitive effect. *Id.* at 12a-13a.

2. Following the bench trial, the district court entered judgment in favor of Argus Leader. App., *infra*, 22a. Despite finding, in accordance with all the testimony, that "competition in the grocery business is fierce," *id.* at 17a, the district court concluded that Exemption 4 did not apply because "any potential competitive harm from the release of the requested SNAP data is speculative at best," *id.* at 18a. Given the Eighth Circuit's adoption of *National Parks*, this level of competitive harm did not, in the district court's view, rise to the level where the SNAP data could be treated as "confidential" under Exemption 4. *Id.* at 20a.

3. USDA had already pursued this litigation for six years. Shortly after the district court issued its ruling, USDA informed retailers that it intended to release the store-level SNAP data, signaling it would not appeal.

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new stores, and determine a retailer's overall sales—all of which could ultimately cut into the SNAP retailers' profits. App., *infra*, 11a-13a, 18a.

App., *infra*, 72a. Petitioner Food Marketing Institute (FMI)—a trade association whose members operate tens of thousands of retail food stores, many of which participate in SNAP—moved to intervene and appeal the judgment. *Id.* at 72a-73a.

The district court granted FMI's motion to intervene and stayed its judgment pending appeal. App., *infra*, 77a-78a. The district court observed that whether Exemption 4 applies to store-level SNAP sales data "appears to be [an issue] of first impression in the Eighth Circuit" and that, "[b]ecause there is not a clearly established answer to this issue, FMI could succeed in an appeal." *Id.* at 76a.

C. Proceedings in the court of appeals

The Eighth Circuit affirmed. FMI urged reversal of the district court's opinion on the ground that "confidential" in Exemption 4 should be given its plain meaning, consistent with this Court's precedents. The unrebutted evidence showed that retailers keep secret and closely guard their store-level data. App., *infra*, at 11a-12a & 88a-89a. The court of appeals, nevertheless, disposed of this argument in a single footnote: the court would not consider the plain meaning of the word "confidential" because doing so purportedly "would swallow FOIA nearly whole," and would conflict with what the court of appeals believed to be this Court's guidance that FOIA exemptions should be narrowly construed. App., *infra*, 4a n.4.

FMI separately urged reversal on the basis that disclosing the requested information would result in sufficient competitive harm to trigger Exemption 4's protection under even the atextual *National Parks* test. But like the district court, the panel reasoned that while the requested data might make models marginally more accurate, the evidence did not support a finding that "this marginal improvement in accuracy is likely to cause *substantial* competitive harm." App., *infra*, 5a. The panel

emphasized that even if there was a "likelihood of commercial usefulness"—in other words, that third parties indeed could exploit information that their competitors had confidentially submitted to the Government—that was insufficient to trigger Exemption 4 because it was "not the same as a likelihood of substantial competitive harm." *Ibid.* The panel did not address the precedents from other Circuits that FMI had relied on in support of its position. See *id.* at 5a-6a.[5]

The Eighth Circuit denied both FMI's petition for rehearing *en banc*, App., *infra*, 85a-86a, and its motion to stay issuance of the mandate, *id.* at 79a-80a.

D. This Court's recall and stay of the Eighth Circuit's mandate

FMI filed an application with this Court to recall the Eighth Circuit's mandate and stay the judgment, arguing that all of the recall-and-stay factors were satisfied: (1) there was a reasonable probability the Court would grant certiorari; (2) there was a fair prospect that the Court would reverse the Eighth Circuit; (3) absent a stay, FMI's members would suffer irreparable harm; and (4) the balance of equities favored a stay.

Justice Gorsuch granted a temporary stay on August 9, 2018, and requested a response from Argus Leader. App., *infra*, 81a. After receiving the parties' submissions, Justice Gorsuch referred the application to the Court, which issued an order on August 29, 2018 joined by five Members of the Court that recalled the Eighth Circuit's mandate and stayed its judgment pending resolution of

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[5] The panel did, however, seek to distinguish another Eighth Circuit precedent, *Madel* v. *U.S. Department of Justice*, 784 F.3d 448, 451 (8th Cir. 2015). While the panel below acknowledged that the issues here "appear to mirror" those in *Madel*, it believed a different result was warranted because the *Madel* data was "not analogous to the data in this case." App., *infra*, 6a.

this petition. App., *infra*, 82a. The Eighth Circuit issued an order to the same effect. *Id.* at 83a-84a.

REASONS FOR GRANTING THE PETITION

National Parks' erroneous construction of "confidential" in FOIA Exemption 4 has been embraced by virtually all Circuits, but it conflicts with this Court's guidance about other FOIA exemptions. Bringing Exemption 4 into conformity with the rest of FOIA would independently justify review, particularly as there appears to be no real likelihood that the Circuits themselves will do so. *National Parks* has also generated subsidiary circuit splits that justify certiorari. The two questions presented are mutually reinforcing: Since *National Parks* is the source of the subsidiary circuit splits, disapproving *National Parks* will cause these circuit splits to vanish.

I. THE COURT SHOULD GRANT REVIEW OF THE FIRST QUESTION PRESENTED TO RESTORE FOIA'S PLAIN TEXT (AND ELIMINATE MULTIPLE CIRCUIT SPLITS)

This Court has repeatedly reviewed FOIA exemption cases, recognizing the national importance of properly enforcing *both* of Congress's directives in FOIA: to release information for public transparency *and* to protect some information from widespread public disclosure.[6] But Exemption 4 has thus far escaped the Court's review. That provision protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); see *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 383

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[6] This Court has previously examined Exemptions 2, 3, 5, 6, and 7. See, *e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (Exemption 2); *Baldrige* v. *Shapiro*, 455 U.S. 345, 359 (1982) (Exemption 3); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (Exemption 5); *U.S. Dep't of State* v. *Wash. Post Co.*, 456 U.S. 595, 598 (1982) (Exemption 6); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 160 (2004) (Exemption 7).

(2015) (Thomas, J., dissenting from denial of certiorari) ("We have never interpreted Exemption 4[].").[7]

This Court's guidance on Exemption 4 is badly needed now. Despite occasional articulated misgivings, the Circuits have felt constrained by precedent and the goal of uniformity to ignore Exemption 4's unambiguous language, transforming the word "confidential" into something far from its ordinary definition.[8] Restoring this ordinary definition, in turn, would resolve multiple second-order circuit splits caused by the Circuits' attempts to give meaning to the convoluted and atextual *National Parks* test. Certiorari review of the first question presented is thus warranted, as resolving this antecedent question will make the subsidiary circuit splits disappear. See, *e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2559-2560 (2015) (eliminating "numerous splits among the lower federal courts" regarding the application of the Armed Career

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[7] All citations to *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383 (2015), in this Petition are to Justice Thomas's dissent from denial of certiorari (joined by Justice Scalia). No opinion or other dissent was issued by the Court or its Members.

[8] Interpretive difficulties have not plagued other parts of Exemption 4. The terms "commercial or financial" have been given their ordinary meaning. *E.g.*, *Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) ("[W]e have consistently held that the terms 'commercial' and 'financial' in the exemption should be given their ordinary meanings."). The phrase "obtained from a person" has rarely attracted interpretive attention, given its obvious distinction with *government*-generated information. See Department of Justice Guide to the Freedom of Information Act 271 (2009) https://www.justice.gov/oip/foia_guide09/exemption4.pdf (observing that the "obtained from a person" criterion "is quite easily met in almost all circumstances") (hereinafter "DOJ FOIA Guide"). There is no dispute in this appeal that the information at issue is "commercial or financial information obtained from a person" as required by Exemption 4. App., *infra*, 2a & n.2.

Criminal Act by resolving the antecedent question that the Act's residual clause was unconstitutionally vague).

A. *National Parks'* substantial-competitive-harm test was wrong and should be replaced with the ordinary meaning of "confidential"

1. *The Circuits have developed an entrenched and atextual interpretation of "confidential" based on vague legislative history*

a. Lower courts started off on the wrong track by adopting an erroneous test for Exemption 4 initially fashioned by the D.C. Circuit in *National Parks*:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d at 770 (footnote omitted).

National Parks came from an era when most courts were less than rigorous about statutory text—and *National Parks* exemplifies this approach. The opinion made no attempt to base its test on the plain-text definition of "confidential." Rather, the D.C. Circuit simply replaced the plain text with a legislative-purpose test based on an especially weak form of legislative history—witness testimony at a hearing that was actually about a predecessor bill from a prior Congress.

National Parks began by acknowledging that, "[i]n the past," interpretation of Exemption 4 had been "guided by" a Senate Report excerpt stating: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or

other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." 498 F.2d at 766 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Harmless enough, but the opinion then declared that "[a] court must *also* be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767 (emphasis added).

The court purported to find this legislative purpose in various excerpts from additional Senate and House reports, and statements made during a Senate committee hearing. *Id.* at 767-770. The bill under consideration—"the predecessor of the bill which became law," *id.* at 768—contained *no* exemption for trade secrets or commercial or financial information, and several witnesses testified to the necessity of such an exemption. In particular, the court observed that during hearings several witnesses urged an exemption that would "protect[] persons who submit financial or confidential data to government agencies from the competitive disadvantages which would result from its publication." *Ibid.* Based on this statement, the court equated the statutory term "confidential" (the term used in the later bill that became FOIA) with "likely to cause substantial harm to his competitive position." *Id.* at 770.[9]

Of course, the text Congress actually enacted says nothing about "competitive harm." Exemption 4 exempts *all* "confidential" commercial or financial information obtained from a person, without exception. 5 U.S.C.

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[9] The D.C. Circuit also held, based on the same legislative history excerpts, that information may be "confidential" based on the *government's* interest (rather than private interests), for instance "if disclosure of the information is likely * * * to impair the Government's ability to obtain necessary information in the future." 498 F.2d at 770. It "express[ed] no opinion as to whether other governmental interests are embodied in this exemption." *Id.* at n.17.

§ 552(b)(4). In *National Parks*, the D.C. Circuit substituted alternative language that was narrower than what Congress actually adopted; it took one stated problem that might have motivated Congress to act and assumed that, once alerted to the problem, Congress addressed *only* that problem despite choosing broader language. And even if that statutory revision were justifiable, the court did not explain why a showing of *substantial* competitive harm was required.

Since *National Parks*, the Circuits have fallen in line behind this atextual Exemption 4 test, and there is no indication they will return to FOIA's plain text. At least ten Circuits have embraced the *National Parks* test, and an eleventh has applied it in an unpublished decision; none has rejected it.[10]

b. But *National Parks* has attracted eminent critics. D.C. Circuit Judge Randolph, joined by Judge Williams, decried that test as "fabricated, out of whole cloth." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), *vacated*, 942 F.2d 799 (1991). Judge Randolph pointed out that under "ordinary usage," the term

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[10] See, *e.g.*, *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Am. Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 167 & n. 24 (3d Cir. 2000); *Acumenics Research & Tech.* v. *U.S. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Cont'l Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975); *Gen. Elec. Co.* v. *U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402-1403 (7th Cir. 1984); *Madel*, 784 F.3d at 452; *Pac. Architects & Eng'rs* v. *U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson* v. *Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990); *Nat'l Parks*, 498 F.2d at 770 (D.C. Cir.). The Eleventh Circuit has applied *National Parks* in an unpublished decision. See *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284 (11th Cir. 2007).

"confidential" means "conveyed [and] acted on * * * in confidence" and "not publicly disseminated." *Ibid.* (quoting Webster's Third Int'l Dict. 476 (1981)). He further criticized the judicially-created "substantial harm test" on the grounds that "[i]nformation not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than objectively measurable harm." *Id.* at 948. "If this were a question of first impression," Judge Randolph wrote, "I would apply the common meaning of 'confidential' and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court." *Ibid.*

Judge Randolph's criticism led the D.C. Circuit to rehear *Critical Mass*—this time *en banc*—and reconsider *National Parks*. *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) *(en banc)*. But the 7-4 majority opinion in *Critical Mass* ultimately retained the "well established" *National Parks* test: "Whatever our individual opinions as to the merits of the two-part test, we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that '*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 877 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)). (As described *infra* pp. 24-30, even this defense of *National Parks* was mistaken—as time has shown, courts' attempts to parse the D.C. Circuit's words and predict whether each tranche of requested information is "likely" to cause "substantial competitive harm" has led to unpredictable results and multiple circuit splits.)

The *en banc* D.C. Circuit also attempted to "correct some misunderstandings as to [the test's] scope and application," *id.* at 875, but that effort only caused further confusion. It reaffirmed that the *National Parks* substantial-competitive-harm test applies to information that parties

are *required* to submit to the government. *Id.* at 880. Information *voluntarily* provided, on the other hand, is protected by Exemption 4 so long as it "is not customarily release[d] * * * to the public"—the definition of confidentiality the court had embraced prior to *National Parks*. *Ibid.* The statute itself recognizes no such distinctions, and the court made no pretense to the contrary. The only supporting authorities for this modified test were quotes from *National Parks*' own summary of Exemption 4's legislative history. *Id.* at 877-878 (quoting "observations and conclusions" from *National Parks*). Additional inconsistencies have appeared because not all courts have adopted these variations. *See infra* p. 28-29.

In 2015, two Members of this Court joined *National Parks*' critics. Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari in *New Hampshire Right to Life*, 136 S. Ct. at 385, a case that in part involved FOIA Exemption 4. This Court, Justice Thomas observed, has "rejected interpretations of other FOIA exemptions that diverge from the text." *Id.* at 383. Notably, the federal Government itself—the party opposing certiorari in *New Hampshire Right to Life*—did not defend Exemption 4's interpretation under those precedents. It instead conceded "that every court that has adopted the *National Parks* definition of 'confidential' information has turned its back on the statutory text." *Id.* at 385 n.*. Denying certiorari, Justice Thomas lamented, "perpetuate[d] an unsupported interpretation of an important federal statute and further muddie[d] an already amorphous test." *Id.* at 385.

The decision below confirms that the Circuits have not course corrected in light of Justice Thomas's and other jurists' criticisms. Given *National Parks*' entrenchment, this Court's review is necessary to restore the plain-text directive that Congress gave in Exemption 4 to protect all confidential business information from FOIA disclosure.

2. National Parks *contravenes this Court's precedents that require plain-text interpretations of FOIA exemptions*

Both as a matter of this Court's general statutory-construction principles and its specific FOIA case law, "confidential" should be given its ordinary meaning as information that is held in confidence and not publicly disseminated. In fact, the Court *already has* given it that meaning when it considered a separate FOIA exemption using that word.

a. This Court has repeatedly instructed that all statutory construction begin with the text and go no further when the statutory language is plain. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) ("The plain text of the Bankruptcy Code begins and ends our analysis."). Courts "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citation omitted); *accord FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994).

Despite this Court's repeated instructions regarding statutory interpretation, the Court has had to rescue other FOIA exemptions from atextual glosses on multiple occasions. See, *e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (giving "personnel" in Exemption 2 its plain meaning); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (seeking "textual justification" for proposed interpretation of Exemption 5); *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to "read into the FOIA [language] that Congress did not itself provide"); *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 804 (1984) ("We * * * simply interpret Exemp-

tion 5 to mean what it says."); cf. *N.H. Right to Life*, 136 S. Ct. at 383 (describing the Court's repeated practice of "reject[ing] interpretations of * * * FOIA exemptions that diverge from the text").

b. Under the canons of construction, interpreting Exemption 4 should be straightforward. "Confidential" has an ordinary, commonly understood meaning, and Congress did not provide a different definition. Information is confidential if it is "[c]ommunicated in confidence; of the nature of confidence; secret," a "communication in confidence of private matters,"[11] or "intended to be held in confidence or kept secret."[12] See also, *e.g.*, *Critical Mass*, 931 F.2d at 947 (Randolph J., concurring) (noting that under the "ordinary usage" of the term, a report is "confidential" if it is "not publicly disseminated" or "conveyed [and] acted on * * * in confidence" (citing Webster's Third Int'l Dict. 476 (1981))).

Contrary to the *National Parks* formulation, the ordinary meaning of confidential contains no sense of *harm*, let alone harm that is "likely," "substantial," and "competitive." The D.C. Circuit erroneously imported such concepts into the interpretation of "confidential" based on testimony before congressional committees, not the statute's actual words. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98-99 (1991) (where a statute contains an unambiguous word, the Court will not "permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process").

c. Nor should it even be an open question that

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[11] Webster's Second Int'l Dictionary 560 (1957); see also Black's Law Dictionary 370 (4th ed. 1951) ("private; secret"); Oxford English Dictionary, http://www.oed.com/ ("2. Of the nature of confidence; spoken or written in confidence; characterized by the communication of secrets or private matters") (last visited Oct. 9, 2018).

[12] Webster's Seventh New Collegiate Dictionary 174 (1963).

Congress used "confidential" in its ordinary sense. Congress used the same word in Exemption 7, just a few paragraphs after Exemption 4, and this Court authoritatively gave that word its ordinary meaning in *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993). For at least three reasons, *Landano* should be dispositive of this question.

First, the Court specifically gave Exemption 7's use of "confidential" its ordinary meaning, observing that the word "is not limited to complete anonymity or secrecy." *Ibid.* (citing Webster's Third New Int'l Dict. 476 (1986)).[13] "A statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." *Ibid.* Consequently, "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *Id.* at 174.

Second, the Court specifically *rejected* an alternative definition of the term that "relie[d] extensively on legislative history" and, in particular, on testimony given before Senate and House committees. *Id.* at 178. The Court emphasized that, "[h]ad Congress meant to create" the particular rule advocated in the legislative testimony, "it could have done so much more clearly." *Ibid.* In other words, this Court accepted what *National Parks* rejected (plain text), and rejected what *National Parks* embraced (legislative history to generate an unusual interpretation).

Third, "[a] term appearing in several places in a

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[13] Exemption 7 permits the government to withhold information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D).

statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). The Court has in fact applied this very principle *to FOIA exemptions*. *Milner* used the appearance of "personnel" in Exemption 6—"just a few short paragraphs down" from Exemption 2—to bolster its interpretation of the same word in Exemption 2: giving "personnel" its ordinary meaning. 562 U.S. at 570. Exemption 7's use of "confidential" is likewise "just a few short paragraphs down" from Exemption 4's use of that term, and it should likewise be given its ordinary meaning.

d. The flawed *National Parks* test for "confidential[ity]" in Exemption 4 has also had the collateral consequence of marring that exemption's separate "trade secrets" prong. After the D.C. Circuit fabricated the substantial-competitive-harm test to define "confidential," the same court in *Public Citizen* was confronted with how to distinguish confidential commercial or financial information from "trade secrets." *Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1288-1289 (D.C. Cir. 1983). *Public Citizen* acknowledged that a broad common-law definition of trade secrets was widely accepted in other areas of the law. *Ibid.* But that broad definition overlapped—perhaps entirely—with *National Parks*' judicially-created definition of "confidential," and would "render[] meaningless the second prong of Exemption 4." *Id.* at 1289.

To avoid this surplusage problem, *Public Citizen* gave "trade secret" a narrow meaning: "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" that has a "direct relationship" to the productive process. *Id.* at 1288. As the Department of Justice has recognized, this holding "represented a distinct departure from what until

then had been almost universally accepted by the courts—that a 'trade secret' encompasses virtually any information that provides a competitive advantage."[14]

Information qualifying as a trade secret for a protective order or under the Uniform Trade Secret Act, therefore, may well *not* be a trade secret for FOIA purposes, according to the D.C. Circuit—and all to accommodate *National Parks*' idiosyncrasy.

3. Giving "confidential" its ordinary meaning is consistent with FOIA's purposes

The Eighth Circuit refused to give "confidential" its ordinary meaning, disposing of FMI's plain-text argument with a conclusory footnote that reading the exemption plainly would "swallow FOIA nearly whole." App., *infra*, 4a n.4.[15] But a plain-text reading of a FOIA exemption does not undermine the statute's purpose or violate congressional intent. As noted by this Court in *Milner*, such an approach does the opposite: it "gives the exemption the [meaning] Congress intended." 562 U.S. at 572.

a. FOIA unquestionably promotes broad disclosure of government information, but not without limits. "FOIA reflects a general philosophy of full agency disclosure *unless information is exempted under clearly delineated*

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[14] DOJ FOIA Guide at 264.

[15] Exemption 4 could not swallow FOIA whole; it applies only to a subset of information that can be requested from the Government, which invokes Exemption 4 in fewer than 2% of annual FOIA request denials. Office of Information Policy, U.S. Department of Justice, *Summary of Annual Reports for Fiscal Year 2017* at 8, available at https://www.justice.gov/oip/page/file/1069396/download (last visited Oct. 10, 2018). But many parties, litigants, and agencies are still affected—the less than 2% of FOIA denials accounts for approximately 4,700 requests for untold numbers of documents. See *id.* at 7 (reporting that 302,658 FOIA requests were released in part (and thus denied in part) and 38,749 FOIA requests were denied in full).

statutory language." *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994) (emphasis added) (citation omitted). "When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004).

Simplistic arguments about general purpose are possible for *all* statutes. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). FOIA's exemptions reflect Congress's determination of how far is far enough. Exemption 4 is not an inconvenience; it is the law and must be interpreted accordingly. Cf. *Landano*, 508 U.S. at 173 (rejecting a narrow definition of "confidential"); *Weber*, 465 U.S. at 798 ("The plain language of [Exemption 5] itself, as construed by our prior decisions, is sufficient to resolve the question presented.").

Regardless, nothing suggests that FOIA will cease to serve its larger purpose if its terms are applied as written. FOIA's purpose, in part, is to contribute to "public understanding of the operations or activities *of the government*." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (citation omitted). Exemption 4 serves a limited but important role: it shields from disclosure certain information that was "obtained from a person"—*i.e.*, non-governmental third parties. 5 U.S.C. § 552(b)(4).[16] Imposing extra-

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[16] See *Bd. of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980) (concluding Exemption 4

textual restrictions on what Exemption 4 means by "confidential" does little if anything to improve public understanding of the Government's activities—and it does so at the expense of those who do business with the Government.

b. Restoring "confidential" to its ordinary meaning would also create a workable standard. The amorphous substantial-competitive-harm standard established by *National Parks* has, as described below, resulted in extensive litigation and unpredictable and inconsistent results. See *infra* pp. 24-30. Without a more predictable standard, private parties cannot make an informed decision about whether to participate in government programs that require them to disclose their confidential information to government agencies; nor do they (or the agencies in possession of their information) have the information they need to properly present their position at trial if a FOIA request is made for the submitted information. Restoring the ordinary meaning of "confidential" would allow a readier assessment of whether the data was confidentially held and not otherwise publicly disseminated by its source.

c. *National Parks* should not survive merely because of its entrenchment in the lower courts. In many contexts, including FOIA, this Court has rejected similarly longstanding but atextual statutory interpretations. In *Milner*, for example, the Court addressed FOIA Exemption 2, which shields from disclosure material that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The Court abrogated extra-textual tests that the D.C. Circuit had developed, and replaced them with a plain-text interpretation of the exemption that was based on dictionary definitions of

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is "restrict[ed]" to information that has "not been generated within the Government").

"personnel." 562 U.S. at 579-580 (abrogating *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*)). "Our consideration of Exemption 2's scope starts with its text," the Court explained—regardless of how entrenched an atextual decision had become. *Id.* at 569.

A proper understanding of Exemption 4 would have required a different outcome here. Argus Leader has never disputed that the requested data is not publicly available and is carefully safeguarded by retailers. This should not have been a close case, let alone one requiring a two-day trial.

B. Rejecting *National Parks*' substantial-competitive-harm test would eliminate at least five circuit splits

The *National Parks* test for FOIA Exemption 4 has spawned multiple circuit splits requiring certiorari review. Because this test underlies all of those splits, the easiest way to resolve them would be to review the first question presented, adopt the ordinary meaning of "confidential," and reject the substantial-competitive-harm test.

As previously explained, at least ten Circuits have adopted the substantial-competitive-harm test from *National Parks*, *see supra* p. 14, but they have been unable to consistently apply it. Courts' attempts to parse the D.C. Circuit's language, rather than the statute itself, have yielded splits on every facet of that test. See *N.H. Right to Life*, 136 S. Ct. at 383-385 (*National Parks* test is "nebulous," "convoluted," and "amorphous," with "different limits in different Circuits"). As the Department of Justice has recognized, without guidance from Congress or this Court, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by

establishing general guidelines."[17] It takes forty-three pages for the Department of Justice's guide to Exemption 4 to explore dozens of opinions that have applied the substantial-competitive-harm test, including cataloguing courts' varying approaches, and the different outcomes that courts facing similar fact patterns have reached.[18]

National Parks' inability to generate consistent and predictable outcomes is further evidence that *National Parks* has been wrong all along. Instead of turning on a predictable standard, whether a private party's information must be released by the Government currently "rests on judicial speculation about whether disclosure will cause competitive harm." *N.H. Right to Life*, 136 S. Ct. at 384. The five circuit splits below provide illustrative, though not exhaustive, examples of these inconsistencies:

1. Importantly for the instant case, the Circuits disagree about what constitutes a likelihood of substantial competitive harm. The First and Tenth Circuits have held that "competitors' possible use of the information alone constitutes harm—*even if this would not likely result in any negative consequences for the entity whose information was disclosed.*" *N.H. Right to Life*, 136 S. Ct. at 384 (emphasis added) (citing *N.H. Right to Life* v. *Dep't of*

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[17] DOJ FOIA Guide at 309.

[18] *Id.* at 305-347. As further evidence of *National Parks*' systemic unpredictability, even panels within the same Circuit, reviewing the same facts, have been unable to apply consistently the substantial-competitive-harm test. *E.g.*, *id.* at 309 (reporting a case in which the D.C. Circuit originally affirmed the district court's determination that Exemption 4 applied but, upon reconsideration following a panel member's death, reversed and remanded on the same record—and observing that this case "well illustrate[s]" the "individualized and sometimes conflicting determinations indicative of competitive harm holdings" (citing *Greenberg* v. *Food & Drug Admin.*, 775 F.2d 1169, 1172-1173 (D.C. Cir. 1985), and *Greenberg* v. *Food & Drug Admin.*, 803 F.2d 1213, 1215, 1219 (D.C. Cir. 1986)).

Health & Human Servs., 778 F.3d 43, 51 (1st Cir. 2015)); see *State of Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (testimony that competitors might be able to use information to improve their bargaining positions established likelihood of substantial competitive harm, despite contention that this effect might be negligible). Petitioner met that standard here—USDA proved the information would likely be commercially useful in the competitive marketplace, App., *infra*, at 5a—and thus would have prevailed if respondent had been a newspaper in the First or Tenth Circuits.

The Eighth, Ninth, and D.C. Circuits, however, have required significantly more certainty and specificity, through a detailed showing that the disclosing party would suffer a "defined competitive harm (like lost market share) if competitors used the information." *N.H. Right to Life*, 136 S. Ct. at 384 (citing *McDonnell Douglas Corp.* v. *Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *GC Micro Corp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994)). The Eighth Circuit concluded that Exemption 4 did not apply because USDA's evidence that the requested information would allow competing "grocery retailers to make better decisions," "[a] likelihood of commercial usefulness" was "not the same as a likelihood of substantial competitive harm." App., *infra*, 5a.

2. The D.C. Circuit requires a showing of "actual competition" for Exemption 4 to apply. *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685-686 (D.C. Cir. 1976).[19] But "[c]ourts cannot seem to agree on what kind

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[19] The first *National Parks* panel remanded the case for further consideration in light of the newly-enunciated test, and the district court held two additional hearings. See *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 678 (D.C. Cir. 1976). The outcome of this second appeal was a harbinger of things to come: holding more evidence was needed to determine whether the substantial-competitive-harm

of 'actual competition' must be shown." *N.H. Right to Life*, 136 S. Ct. at 384. Some Circuits require "factual justifications and market definitions to show that there is 'actual competition in the relevant market' in which the entity opposing the disclosure of its information operates." *Ibid.* (citing *Watkins* v. *U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011)). Other Circuits "take an expansive view of what the relevant market is, and do not require any connection between that market and the context in which an entity supplied the requested information." *Ibid.* (citing *N.H. Right to Life*, 778 F.3d at 49-52).

3. The Circuits likewise disagree about whether "actual competition" can be shown based on the possibility of competition from a hypothetical future competitor, or only from a competitor who is already participating in the relevant market.

At least three Circuits will account for hypothetical future competitors. *E.g.*, *People for the Ethical Treatment of Animals* v. *U.S. Dep't of Health & Human Servs.*, 901 F.3d 343, 351-352 (D.C. Cir. 2018) (finding substantial competitive harm where the requested information would, among other things, help new companies enter the market); *N.H. Right to Life*, 778 F.3d at 51 (First Circuit finding that agency met its burden because a "potential future competitor could take advantage" of the information at issue, including in "different arenas"); *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284, 289-290 (11th Cir. 2007) (finding substantial competitive harm in domestic market for vaccines based on giving international competitors or new domestic market entrants a competitive advantage).

The Fourth Circuit, in contrast, has taken a narrower

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test was met, the court of appeals partially reversed and remanded the case for yet a third determination. *Id.* at 687.

view and required the party resisting disclosure to show evidence of existing, non-hypothetical competition. *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (finding the prospect of future competitors too "speculative" to justify applying Exemption 4). And, at times, the D.C. Circuit too has concluded that evidence of "future or potential competition" is "legally inadequate under the *National Parks* standard." *Niagara Mohawk Power Corp.* v. *U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999).

4. Circuits have also reached different conclusions regarding whether bad publicity or "embarrassment" in the marketplace is the type of competitive harm against which Exemption 4 protects. The Second Circuit, for example, has upheld a finding of substantial competitive harm based on the possibility that competitors would use disclosed information to "embarrass" the submitter in the marketplace. See *Nadler* v. *FDIC*, 92 F.3d 93, 97 (2d Cir. 1996). But the D.C. Circuit has held that competitive harm caused by "[c]alling customers' attention to unfavorable agency evaluations or unfavorable press" can never be covered by Exemption 4. See *United Techs. Corp.* v. *U.S. Dep't of Def.*, 601 F.3d 557, 563-564 (D.C. Cir. 2010).

5. In addition to disagreement over how to define each term of the test, the D.C. Circuit's *Critical Mass* opinion modifying *National Parks* has created further fault lines. Under *Critical Mass*, the substantial-competitive-harm test applies in cases "in which a FOIA request is made for * * * information a person was *obliged* to furnish the Government," but a different definition of "confidential" controls when the information at issue was "provided to the Government *voluntarily*." 975 F.2d at 880 (emphases added).

To date, the voluntary/involuntary *Critical Mass* test has been adopted by the D.C. and Tenth Circuits. *State of*

Utah, 256 F.3d at 969. The First Circuit, in contrast, has declined to follow *Critical Mass*'s "lessened standard for voluntary submissions." *N.H. Right to Life*, 778 F.3d at 52 n.8. The Second, Fourth, and Ninth Circuits have, to date, also declined to adopt this standard, specifying however that the voluntary/involuntary distinction was not relevant to the outcome of the appeal before them, or had not been raised by the parties. See *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Am. Mgmt. Servs., LLC* v. *Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Frazee* v. *U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996). Thus, in the First Circuit, all "confidential" information sought to be withheld under Exemption 4 must undergo the *National Parks* analysis, whereas in the D.C. Circuit, only information that is "required" to be provided to the Government is subject to this test.

* * *

In sum, the Court should grant review of the first question presented to restore FOIA Exemption 4's plain text. Doing so would bring Exemption 4 into line with this Court's jurisprudence about statutory construction (generally and for FOIA specifically); it would also have the salutary effect of eliminating widespread confusion and multiple splits among the Circuits.

II. The Court Should At Least Grant Review Of The Second Question Presented And Resolve The Outcome-Determinative Circuit Split Presented On This Record

Even if the Court declines to repudiate the judicially-created *National Parks* test, the second question presented equally merits certiorari review so that the Court can resolve the outcome-determinative circuit split implicated on these facts. Petitioner would have prevailed in the First or Tenth Circuits, which require only that the

requested information could be potentially useful to a competitor; but the Eighth, Ninth, and D.C. Circuits have held that the disclosing party must make a detailed showing that the information will in fact result in a defined competitive harm, like lost market share. See *supra* pp. 25-26 (discussing this split).

Substantial evidence at trial showed how the requested SNAP redemption data would be useful to a competitor. USDA's fact witnesses explained that the release of store-level data would enable existing and potential future competitors to target the retailers' SNAP customers and estimate the total volume of sales at a given location. App., *infra*, 11a-12a. An expert witness walked the court, step-by-step, through how these competitors could apply this data to their competitive advantage. *Id.* at 13a.

Given this significant evidence, the Eighth Circuit concluded that USDA had proven that the requested data "might prove useful" to the retailers' competitors if it were released. App., *infra*, 5a. That showing would have been sufficient in the First and Tenth Circuits to prevent the disclosure of petitioner's information. See *N.H. Right to Life*, 778 F.3d at 51; *State of Utah*, 256 F.3d at 971. Nonetheless, the Eighth Circuit found this showing insufficient because "[a] likelihood of commercial usefulness—without more—is not the same as a likelihood of *substantial* competitive harm." App., *infra*, 5a (emphasis added). This case therefore squarely implicates the circuit split between the First and Tenth Circuits, versus the Eighth, Ninth, and D.C. Circuits.[20]

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[20] Further confirming the confusion spawned by the *National Parks* substantial-competitive-harm test, the Eighth Circuit could and should have reached a different conclusion based on its own prior precedent. In *Madel*, 784 F.3d at 453, a party invoked Exemption 4 and provided affidavits stating that information "could be used to determine the companies' market shares, inventory levels, and sales

This case is thus an excellent example of the widespread confusion among the Circuits in applying the *National Parks* substantial-competitive-harm test. This Court's review of either or both questions presented is warranted to address these exceptionally important questions regarding FOIA Exemption 4.

III. This Case Presents An Ideal Vehicle For Review Of FOIA Exemption 4 And Both Questions Presented

Though this Court has reviewed other FOIA exemptions—some several times—it has never interpreted Exemption 4. See *supra* p. 10. This case presents a clean vehicle for the Court to restore clarity to Exemption 4 and resolve the confusion in the Circuits. The Court's grant of petitioner's application to recall the Eighth Circuit mandate, App., *infra*, 82a, shows that a majority of the Court has already recognized that the case is likely worthy of certiorari review and likely warrants reversal.

No other issues cloud this case. The definition of "confidential" in Exemption 4 was the *only* issue decided in the judgment below. There is no dispute in this appeal that the requested information otherwise qualifies for protection under the exemption as "commercial or financial information obtained from a person." 5 U.S.C. § 552(b)(4). The Court can therefore narrowly focus on this question of statutory interpretation without having to resolve tangential or fact-laden issues related to the rest of the statute.

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trends in particular areas." Although the affidavits did not specify how each distributer actually would be affected beyond these generalities, *Madel* found that this was sufficient to prevent disclosure. *Ibid.* Although the panel below acknowledged that the issues in this case "appear to mirror" the issues in *Madel*, it cryptically declared that a different result was merited because the data in *Madel* was "not analogous to the data in this case." App., *infra*, 6a.

The *National Parks* test for "confidential" under FOIA Exemption 4 has been entrenched for years among the Circuits, and there is no indication that any Circuit can or will fix the confusion in this area. Thus, further percolation will not aid this Court's review, and there is no likelihood that the Circuits will resolve the interpretation of "confidential" on their own. Instead, the lower courts will continue to disregard the plain meaning of "confidential" and apply the *National Parks* test in myriad inconsistent ways.

The Court's resolution of one or both questions presented will be dispositive of this case. Undisputed evidence was presented at trial that retailers closely guard and keep store-level SNAP data secret. *See supra* p. 6. This information is therefore "confidential" under that term's plain meaning. Likewise, the outcome of this appeal in the Eighth Circuit would have been different, and petitioner would have prevailed, had the Eighth Circuit adopted the construction of likelihood of substantial competitive harm advocated by petitioner and embraced by at least the First and Tenth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-1346

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellee

v.

United States Department of Agriculture

Defendant

Food Marketing Institute

Intervenor Defendant - Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: March 14, 2018
Filed: May 8, 2018

Before GRUENDER, BEAM, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

This case returns to us after a bench trial. Intervenor Food Marketing Institute (FMI) argues the district court[1] erred in finding that Exemption 4 to the Freedom of Information Act (FOIA) is inapplicable to data held by the U.S. Department of Agriculture (USDA).

Most of the relevant facts are set out in our previous opinion. See Argus Leader Media v. U.S. Dep't of Agric., 740 F.3d 1172,1173-75 (8th Cir. 2014). The data in question come from the Supplemental Nutrition Assistance Program (SNAP). The USDA issues SNAP participants a card (like a debit card) to use to buy food from participating retailers. When a participant buys food using their SNAP card, the USDA receives a record of that transaction, which is called a SNAP redemption. Argus Leader Media, a South Dakota newspaper, asked the USDA for annual SNAP redemption totals for stores that participate in the SNAP program (the "contested data"). The USDA refused, citing several FOIA exemptions. In our previous opinion, we held that Exemption 3 did not apply to the contested data, and remanded the case to the district court. Id. at 1176-77.

On remand the only issue was whether FOIA Exemption 4, which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), applies to the contested data. Argus Leader and the USDA agreed that the contested data were commercial or financial information, and that they were not privileged.[2] To show the contested data were "confidential," the USDA had to

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[1] The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

[2] The district court found that the contested data were obtained from a person, and neither party contests that finding on appeal.

prove that releasing the data was likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Madel v. U.S. Dep't of Justice, 784 F.3d 448, 452 (8th Cir. 2015) (quoting Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001)). The USDA argued only the competitive position prong, so the question before the district court was whether releasing the contested data was likely to cause substantial harm to the competitive position of SNAP retailers.

The case went to bench trial. Both parties called experts to testify about the risks of disclosing the contested data. In its findings of fact and conclusions of law, the district court adopted a definition of competitive harm from the D.C. Circuit: "[C]ompetitive harm may be established if there is evidence of 'actual competition and the likelihood of substantial competitive injury . . . .'" Argus Leader Media v. U.S. Dep't of Agric., 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (alteration in original) (quoting Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983)). Applying that standard, the district court found that the grocery retail industry was highly competitive, but that the USDA had not proved a likelihood of substantial competitive injury. Id. at 833-35. The court found the USDA's claims of competitive injury were "speculative at best" because grocery retailers already had access to large quantities of data about their competitors, and existing models explained the majority of grocery customers' behavior. Id. at 834. The court also found speculative the USDA's assertion that stores with high SNAP redemptions would face stigma. Id.[3]

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[3] In addition, the district court opined that stigma "is not relevant in an Exemption 4 analysis because it is not a harm caused by a

After the district court entered judgment for Argus Leader, the USDA decided not to appeal. FMI, a trade group representing grocery retailers, intervened and filed this appeal. FMI contests the district court's findings of fact and application of the law to those facts.[4] "We accept the district court's factual findings unless they are clearly erroneous, and we review the applicability of the FOIA exemption de novo." Peltier v. F.B.I., 563 F.3d 754, 762 (8th Cir. 2009).

As to the facts, we see no clear error. FMI argues that the district court erred in finding that release of the contested data would have little effect on the grocery industry, and failed to give enough weight to its assertions that releasing the data would stigmatize some stores and cause stores to stop accepting SNAP. But record evidence showed that the contested data—which are nothing more than annual aggregations of SNAP redemptions—lacked the specificity needed to gain material insight into an individual store's financial health, profit margins,

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competitor." Id. We need not determine the relevance, if any, of stigmatic injury in Exemption 4 cases because, as we explain, the evidence of stigma was insufficient to support a finding of substantial competitive harm alone or in combination with other evidence presented.

[4] FMI also argues in passing that the district court should not have used the D.C. Circuit standard to decide whether releasing the contested data is likely to cause substantial competitive harm. But FMI does not propose an alternate standard. Instead, it argues that the words of the statute—"privileged or confidential," 5 U.S.C. § 552(b)(4)—can be given their dictionary definitions. FMI asserts that "confidential" means "secret," so a record falls within Exemption 4 if it has previously been kept secret. We reject this argument as precluded by "the Supreme Court's admonition that FOIA exemptions 'must be narrowly construed.'" Argus Leader, 740 F.3d at 1176 (quoting Milner v. Dep't of Navy, 562 U.S. 562, 565 (2011)). Under FMI's reading, Exemption 4 would swallow FOIA nearly whole.

inventory, marketing strategies, sales trends, or market share. FMI's assumption that stores would be stigmatized was speculative and not supported by any other evidence in the record. There was also no meaningful evidence that retailers would end their SNAP participation if the contested data were released.

Applying the law to the facts, we find no basis for reversal. The trial evidence showed that the grocery industry is highly competitive, but is already rich with publically-available data that market participants (and prospective market entrants) use to model their competitors' sales. The evidence shows that releasing the contested data is likely to make these statistical models marginally more accurate. But the evidence does not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm. The USDA's evidence showed only that more accurate information would allow grocery retailers to make better business decisions. If that were enough to invoke Exemption 4, commercial data would be exempt from disclosure any time it might prove useful in a competitive marketplace. A likelihood of commercial usefulness—without more—is not the same as a likelihood of substantial competitive harm. We agree with the district court and conclude that the USDA failed to establish that release of the contested data falls within Exemption 4's ambit.

In an effort to avoid this conclusion, FMI cites to our opinion in Madel. In that case, we affirmed Exemption 4's application to Drug Enforcement Administration (DEA) records pertaining to oxycodone transactions by private companies. See Madel, 784 F.3d at 451-53 (noting that one of the requested documents "contain[ed] information traceable to individual manufacturers and distributors, such as market shares in specific geographic areas, estimates of inventories, and sales" for the entire nation-

wide market for oxycodone). We cited DEA declarations that the requested records "could be used to determine the companies' market shares, inventory levels, and sales trends in particular areas" which might allow competitors "to target specific markets, forecast potential business of new locations, or to gain market share in existing locations, thereby gaining competitive advantage." Id. at 453 (cleaned up). While these concerns appear to mirror those raised by the USDA in this case, Madel is distinguishable. In Madel, the data in question were sufficiently specific (records of individual companies' sales of a particular drug) that their release was likely to provide a tangible competitive advantage. The contested data in this case, by contrast, are more general, and add little to the information already available to retailers. Because the Madel data are not analogous to the data in this case, the result is different.[5]

For these reasons, we affirm the judgment of the district court.

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[5] We also note that Madel was decided on summary judgment. The government is entitled to summary judgment when its "affidavits provide specific information sufficient to place the documents within the exemption category, *if* this information is not contradicted in the record." Id. at 452 (emphasis added) (quoting Quiñon v. FBI, 86 F.3d 1222, 1227 (D.C. Cir. 1996)). In Madel, the party seeking disclosure did not submit any evidence to rebut the government's proffer. Id. at 453.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 05/08/18)

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellee

v.

United States Department of Agriculture

Defendant

Food Marketing Institute

Intervenor Defendant - Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

JUDGMENT

Before GRUENDER, BEAM and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 08, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 11/30/16)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

MEMORANDUM OPINION
AND ORDER

Plaintiff, Argus Leader Media, brings this Freedom of Information Act (FOIA) suit against defendant, United States Department of Agriculture (USDA). Argus seeks data on the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. The USDA opposes releasing the data based on FOIA Exemption 4, arguing that such disclosure would cause substantial competitive harm to grocery stores participating in SNAP. This court disagrees and holds that disclosure of the requested data will not cause

substantial competitive harm to SNAP retailers. The data should be disclosed under FOIA.

BACKGROUND

The USDA administers SNAP through the Food and Nutrition Service, an agency within the USDA. The purpose of SNAP is to give children and needy families access to food and nutrition education. When SNAP households redeem their benefits, the transaction looks like a customer using a debit card. The SNAP household pays for its groceries by swiping a benefits card and entering a PIN number. A third-party processor verifies that the SNAP account has available benefits and then approves or denies the transaction. If the transaction is approved, the third-party processor then transfers money from the SNAP household's account to the retailer's bank and sends the redemption data to the Food and Nutrition Service.

Argus, in 2011, made a FOIA request to the Food and Nutrition Service. Argus sought a variety of SNAP data–including yearly spending totals at individual retail locations. About two weeks later, the Food and Nutrition Service provided some of the requested information and withheld the remainder citing FOIA Exemptions 3 and 4. Argus then filed an administrative appeal. Before the USDA formally denied the appeal, Argus filed this action.

The USDA, in 2012, filed its first motion for summary judgment. This court granted the USDA's motion and held that Exemption 3 of FOIA applied to the undisclosed data. The Eighth Circuit Court of Appeals reversed and remanded the case. In 2015, the USDA filed its second motion for summary judgment, arguing FOIA Exemptions 4 and 6 applied to the requested data. This court denied the motion and scheduled the case for a bench trial. Before trial, the USDA withdrew its Exemption 6 argument, and the parties stipulated that the only issue

remaining for the court to decide was whether Exemption 4 applied to yearly SNAP revenues for individual stores.

The bench trial began on May 24, 2016. A number of Food and Nutrition Service employees testified about the collection of SNAP data. Witnesses also testified about the potential harm in disclosing the requested data, including the USDA's witness Joey Hays. Hays is the President and Owner of Dyer Foods Incorporated, a supermarket chain that started in Dyer, Tennessee and has expanded to 13 locations. Hays has spent 35 years in the grocery business. Hays testified that individual store SNAP sales data is not public information and that release of the data would cause competitive harm to his business because competitors could use the information against him. On cross examination, however, Hays admitted that releasing the SNAP data would not give competitors a store's total profits. Hays also admitted that much of a store's business is already visible to the public such as product selection and price. Hays further testified that Wal-Mart has already saturated his market, even without the requested SNAP information.

Andrew Johnstone, Associate General Counsel for Sears Holdings Management Corporation, also testified for the USDA. Johnstone echoed Hays's comments that the grocery business is especially competitive because the profit margins are low. Johnstone testified that if the requested SNAP data was disclosed it would help competitors take away business from Kmart stores. Finally, Johnstone noted the potential stigma that might result from publishing SNAP data. Specifically, Johnstone was concerned that landlords would not renew their lease agreements if the data showed that KMart stores had high SNAP sales. On cross examination, Johnstone testified that store data is already publically available to market researchers. Such data includes a store's location, products, and pricing. Johnstone also

testified that if the SNAP information was released, it would be released regarding all SNAP retailers.

Peter Larkin, President and CEO of the National Grocers Association, testified that profit margins in the grocery industry are roughly 1% before tax. He also testified that a 2014 study found profit margins to be $0.0091 on every dollar. Thus, grocery stores must have a high sales volume to make a profit. Larkin also testified that individual store SNAP data is not available currently to the public, and Larkin reasoned that injecting new sales information into the public domain could impact stores because competitors could target high dollar SNAP locations and build new stores in that area. On cross examination, Larkin admitted that a number of factors play a role in a customer's decision to shop at a grocery store such as better produce, convenient location, unique products, or better customer service. Larkin also testified that disclosing SNAP data would not be the same as disclosing a store's profits or net sales.

Gwen Forman, Senior Vice President of Marketing at Cumberland Farms, theorized that SNAP data is valuable because it confirms whether or not a store's practices are successful. Although the public sees a store's advertising and customer outreach, a competitor cannot confirm whether the store's strategy is effective. Releasing SNAP data—Forman argues—allows competitors to gauge whether a store's marketing strategy is effective. On cross examination, Forman admitted that a number of other factors also determine whether a store is ultimately successful at a given location. SNAP data alone will not determine a store's future plans or business strategy.

Argus's first witness was Dr. Richard Volpe, an Assistant Professor in the Agribusiness Department at California Polytechnic State University. Dr. Volpe testified that a variety of store data is already public. For

example, a store's prices, level of activity, layout, and assortment of products are visible to anyone visiting the store. This data is already being collected and is available to retailers. Dr. Volpe also addressed concerns about benchmarking, the practice of analyzing a store's sales over a period of years. Dr. Volpe explained a benchmarking analysis of SNAP data has limited value because a store's increased SNAP revenue may be attributable to a number of factors such as increased prices, change in customer demographics, or increased number of SNAP customers. Because additional data is necessary to determine the reason for increased SNAP sales, the release of individual store SNAP data would not cause competitive harm.

Argus's next witness was Dr. Ryan Sougstad, Associate Professor of Business Administration at Augustana University. Dr. Sougstad testified about how companies use data to come to decisions. Dr. Sougstad testified that individual retailer SNAP data would not likely play a significant role in helping businesses decide where to locate stores. On cross examination, Dr. Sougstad admitted that he was unable to determine to what degree stores would be less profitable if the requested SNAP data was released, but he believed any economic harm would be marginal.

The USDA's one rebuttal witness, Bruce Kondracki, Vice President of Market Insights and Consumer Research at Dakota Worldwide Corporation, testified about market analysis in the food industry. Kondracki explained that grocery stores use model forecasts to determine where to add locations and that releasing SNAP data could improve the accuracy of these models. Kondracki also testified that the addition of new stores does not necessarily mean customers quit frequenting their current store, but customers may spend less money at their current store.

LEGAL STANDARD

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enf't Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 562 U.S. at 565. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008) (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993). "The government bears the burden of proving by a preponderance of the evidence that a withheld document falls within one of the exemptions." *Enviro Tech Int'l, Inc. v. U.S. EPA*, 371 F.3d 370, 374 (7th Cir. 2004) (citing § 552(a)(4)(B)). This court has made all of its factual determinations by a preponderance of the evidence.

DISCUSSION

The exemption at issue here is FOIA Exemption 4. The Eighth Circuit Court of Appeals has explained that "[t]he plain language of [Exemption 4] exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975) (internal

quotation omitted). Neither party has argued that the requested SNAP data is a trade secret, so the issue before the court is whether the requested FOIA information is (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential. The parties have stipulated that the information is commercial or financial, so only the remaining two elements are discussed below.

A. The SNAP information is obtained from a person.

The Supreme Court has explained that information is "obtained from a person" if the "information [is] obtained outside the Government." *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979). In *FCC v. AT&T*, 562 U.S. 397, 408-09 (2011), the Supreme Court held a corporation was a person under Exemption 4 analysis. Argus asserts that because SNAP is a government program, the requested SNAP data is obtained from inside the government. The government is giving SNAP benefits to qualifying households, and the government then tracks where the SNAP households are spending their benefits. Argus contends that the government is essentially keeping track of its own spending. Thus, Argus's position is that all of the redemption data is generated and collected by the government and that the SNAP data is obtained from the government.

The Eighth Circuit Court of Appeals has already held that Exemption 3 does not apply to this case In that opinion, the Eighth Circuit held that the requested information is "'obtained' from third-party payment processors, not from individual retailers." Docket 44 at 6 (citations omitted). This conclusion is supported by the testimony from the Food and Nutrition Service employees. Neither party disputes that it is the third-party processor who verifies whether the SNAP household has available SNAP benefits and that the third-

party processor submits the redemption data to the Food and Nutrition Service. Based on the Eighth Circuit's ruling and the testimony at trial, this court finds that the requested information is obtained from a person, namely the third-party processors who facilitate the SNAP transactions.

B. The SNAP information is not privileged or confidential.

Information is confidential if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).[1] This test, which the Eighth Circuit Court of Appeals adopted from the District of Columbia Court of Appeals, is commonly known as the *National Parks* test and "has been widely recognized and applied by the circuit courts when construing Exemption 4." *Id.* Because the parties agree that prong 1 of the *National Parks* test is inapplicable, only prong 2 is addressed. Docket 61 at 19-20.

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[1] Another test is used if the person or entity submitting information is acting voluntarily. That test is inapplicable here, however, because SNAP retailers are required to disclose EBT data if they want to be compensated. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (holding a bid to do government work is not voluntary under Exemption 4 because the bid must be submitted in order to win the contract); *see also* Defendant's Memorandum in Support of Motion for Summary Judgment, Docket 61 at 19 (stating "[T]he agency's position is that the information here is required to be submitted.")

The Eighth Circuit Court of Appeals has not articulated the showing necessary for a party to prove that release of information would cause substantial harm under prong 2. But the District of Columbia Circuit has found that prong 2 competitive harm may be established if there is evidence of "actual competition and the likelihood of substantial competitive injury . . . ." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (internal quotation omitted).[2] Competitive harm is limited to "harm flowing from the use of proprietary information *by competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Id.* n. 30. When assessing the potential for competitive harm, a court may consider the nature of the material sought, the competitive circumstances surrounding the disclosure, and credible opinion testimony. *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976). Although a party opposing disclosure "need not 'show actual competitive harm,'" conclusory and generalized allegations—standing alone—are not sufficient. *Food & Drug Admin.*, 704 F.2d at 1291.

1. Actual competition

Competition in the grocery business is fierce. This conclusion is supported by the testimony of Joey Hays, Andrew Johnstone, Peter Larkin, Gwen Forman, and Bruce Kondracki. Johnstone noted that competition in the grocery business has increased with the entrance of new competitors, and Larkin provided testimony that the profit margins in the grocery industry are at $0.0091 on

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[2] *See also Sharkey v. Food & Drug Admin.*, 250 Fed. Appx. 284, 288 (11th Cir. 2007).

every dollar spent. Kondracki also explained competition is not measured solely in terms of lost customers, but in lost dollars to other stores. Kondracki testified the entrance of a new store into an existing market can cause a significant loss in business. Based on this testimony, the court finds that the grocery industry has actual competition.

2. Likelihood of substantial competitive harm

The competitive harms alleged by the USDA fall into two main categories: (1) harms arising from competitors using SNAP data to lure away customers from other businesses and (2) harms arising from the potential stigma associated with being a high volume SNAP retailer. Forman's testimony encapsulated the retailers' overarching concerns of the former. Forman explained how competitors could use SNAP data to choose the locations of new stores, evaluate an existing store's overall success, and ultimately cut into another store's profits. Hays, Johnstone, Larkin, and Kondracki all gave testimony supporting this conclusion that disclosure of individual store redemption data could cause competitive harm because competitors in the grocery business could use the information to target an existing store's customers.

This analysis, however, is incomplete. Competitors in the grocery industry already use a variety of publicly available information to make decisions. This information includes a store's location, layout, pricing, product selection, and customer traffic. Dr. Volpe and Dr. Sougstad both noted that while SNAP information may provide some insight into a store's overall financial health, the data is a small piece in a much larger picture—disclosure would have a nominal effect on competition in the grocery industry. Kondracki's models of consumer behavior appear to support this point. Kondracki testified

that the current market models can reach correlations of .9 or .99. This appears to indicate that while SNAP data may be beneficial, it would not add significant insights into the grocery industry. This conclusion is further supported by the testimony of Hays. Hays testified that competitors such as Wal Mart have already saturated the market where he competes. Wal Mart took these actions without the requested SNAP data. This court concludes that any potential competitive harm from the release of the requested SNAP data is speculative at best.

The second concern the USDA voiced to releasing SNAP data was the potential stigma SNAP households and SNAP retailers might face. As noted above, this type of harm is not relevant in an Exemption 4 analysis because it is not a harm caused by a competitor. Even if stigma was relevant, the USDA's evidence on potential stigma was not sufficient to meet its burden. Although Johnstone testified that high SNAP sales revenue might affect a landlord's decision to rent its commercial space to a retailer, it seems unlikely that a landlord would be unaware of its tenant's customer base. Johnstone also did not provide any evidence of the likelihood of this contingency occurring. At best, Johnstone's claims are speculative. Furthermore, the remaining witnesses did not explain how high or low SNAP sales would harm their stores. For example, although a high volume of SNAP sales might encourage a competitor to enter that geographical market, an equally compelling conclusion is that the competitor may decide to stay away from that market. Another equally compelling conclusion is that SNAP sales will have no or little effect on a store's decision to expand into new sites. This is because a variety of factors influence a store's decision to open a new location including: cost of real estate, location of real estate, the business's long-term financial plan and goals, and other

factors. This court finds that the competitive harms associated with stigma are also speculative.

The USDA, in its post-trial reply brief, cited three cases to support its claim that releasing the requested SNAP data would cause competitive harm. Each case, however, is distinguishable from the present litigation because the plaintiffs in the other cases asked for data that would give greater insights into the company's workings. In *Kleppe*, 547 F.2d at 379-80, plaintiffs sought information about company assets, liabilities, net worth, balance sheet information, future and existing projects, and operating capacity. In *Public Citizen Health Research Group*, 209 F. Supp. 2d at 40-41, plaintiffs requested the negotiated royalty rates between private researchers and the government. Finally, in *Sharkey v. Food & Drug Administration*, 250 Fed. Appx. 284, 288-290 (11th Cir. 2007), plaintiffs sought information that would result in the disclosure of domestic market share and sales volume. Here, the requested SNAP data does not provide the same insights into store profitability. SNAP sales are merely a part of the store's total revenue. SNAP data does not disclose a store's profit margins, net income, or net worth. SNAP data also does not disclose how a company bids on government contracts or negotiates with the federal government. In essence, SNAP data is merely a bill from the retailer to the government. As the USDA acknowledges, this type of data is regularly disclosed, and disclosure is consistent with FOIA's underlying purpose. Docket 125 at 5-6. Because of the speculative nature of the USDA's claims and FOIA's preference for transparency and disclosure, this court finds that the release of SNAP data will not likely cause substantial competitive harm to SNAP stores. The data should be disclosed.

CONCLUSION

The USDA has failed to meet its burden to show that Argus's FOIA request falls within Exemption 4 because the USDA did not prove that release of the requested data was confidential. Specifically, USDA did not show that release of the requested information would cause substantial competitive harm if it was disclosed. Thus, it is

ORDERED that judgment will be entered in favor of Argus and against USDA in accordance with this memorandum opinion and order.

DATED this 30th day of November, 2016.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 11/30/16)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT

Pursuant to the court's Memorandum Opinion and Order, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of plaintiff, Argus Leader Media, d/b/a Argus Leader, and against defendant, United States Department of Agriculture.

DATED this 30th day of November, 2016.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121-KES

(Filed 09/27/12)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Argus Leader Media, d/b/a Argus Leader, brought this claim under the Freedom of Information Act (FOIA) to obtain information in the possession of defendant, the United States Department of Agriculture (USDA). Docket 1. After USDA provided some, but not all, of the requested information, Argus Leader requested that a *Vaughn* Index be filed to explain why USDA did not provide the withheld information. Docket 12. USDA resists that motion and claims that a *Vaughn* Index is not necessary because USDA offered detailed affidavits that

sufficiently explained its decision to withhold the information. Docket 15. USDA also moves for summary judgment and argues that its decision to withhold redemption data was appropriate in this case because the material was protected under exemption 3 to the FOIA and should not be released. Docket 18. Argus Leader resists that motion and requests that the redemption data be disclosed because that information is not what Congress meant to exempt under the claimed statute. Docket 33. For the following reasons, USDA's motion for summary judgment is granted.

BACKGROUND

The relevant facts of this dispute, viewed in the light most favorable to the nonmoving party on the motion for summary judgment, Argus Leader Media, d/b/a Argus Leader, are as follows:

On February 1, 2011, Argus Leader emailed a request for specific records to the email address for the Food and Nutrition Service (FNS), which is an agency of the USDA. USDA enforces the Food and Nutrition Act of 2008 (FNA or the Act) in addition to other statutes. The information that Argus Leader requested related to the Supplemental Nutrition Assistance Program (SNAP), or what was formerly known as the food stamp program. The request sought SNAP retail store records from 2005 through 2010 that included: each store's identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer (EBT[1]) sales figures for each participating store. Docket 22 ¶ 11.

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[1] The term food stamps is the label for SNAP benefits that is most familiar to the public. Docket 21 ¶ 7. Many store owners or clients also know or understand their benefits as "EBT," and FNS often uses

While FNS administers the FNA and its regulations and standards, the Benefit Redemption Division (BRD) is the component within FNS that oversees the EBT system. Through the EBT system, SNAP recipients receive an EBT debit card that keeps track of their monthly benefits and is the object that gives them access to food and other qualifying items under SNAP. BRD also ensures that only those retailers that qualify to participate in SNAP do so, and it regulates the retailers who are not in compliance with the regulations and policies designated under the program. BRD is responsible for maintaining the EBT system in a manner that ensures it is responsive to its clients, the states it serves, and the federal government.

The specific requested data still at issue is redemption data—all other data was provided to Argus Leader or was deemed nonessential by Argus Leader. Redemption data is the dollar amount of goods that each retailer sells to SNAP beneficiaries and subsequently redeems from the federal government in a given year. It is one type of information that is generated and stored in a technology system overseen by BRD, which is called the Store Tracking and Redemption System (STARS). Redemption data is "only obtained when a retailer is authorized to accept SNAP cards and processes a SNAP transaction." Docket 21 ¶ 20. Redemption data, however, is only generated for each retailer during the time frame that the retailer would be authorized to participate in SNAP. For instance, if a SNAP retailer is authorized to participate in the program but makes no EBT sales, then the redemption data amount is $0. Docket 21 ¶ 21.

After receiving Argus Leader's request, FNS contacted BRD to collect the data that Argus Leader sought. BRD conducted a search within the STARS

SNAP-EBT in its publications and information. Food stamps, SNAP, and SNAP-EBT all mean the same thing. Docket 21 ¶ 7.

database and gathered records that were pertinent to the request but not subject to a FOIA exemption. BRD produced a CD that contained 321,988 SNAP files viewable on a Microsoft Excel worksheet. FNS sent that CD and a letter to Argus Leader and explained that the agency was not including some of the requested information (like redemption data) because those records were exempt from disclosure pursuant to the Freedom of Information Act Exemptions 3 and 4 and 5 U.S.C. § 552(b)(3) and (b)(4). Docket 22 ¶ 15. FNS also informed Argus Leader of its right to appeal. Argus Leader contacted a representative for FNS and stated that it had received the letter, but the CD only contained 65,536 retailer records. Argus Leader also requested that FNS resend the information in a text format.

On March 3, 2011, Argus Leader submitted its appeal of FNS's decision to withhold the redemption data, which was filed with the FNS Freedom of Information Act Service Center within the Information Management Branch. The appeal worked its way through internal departments and eventually was submitted for legal review on April 13, 2011. On June 13, 2011, FNS received a letter from Argus Leader stating that it would initiate legal action under FOIA if it did not receive a response to its appeal within ten days. Docket 22 ¶ 26. On July 19, 2011, Argus Leader received an unofficial response from FNS via email that attempted to clarify why the requested information was withheld. Meanwhile, the appeal denial was working its way through the federal system and was prepared for final signatures from those who could officially deny the appeal.

Argus Leader filed its complaint on August 26, 2011, and the denial of Argus Leader's appeal was never sent. Docket 1. Argus Leader moved for a *Vaughn* Index on March 5, 2012. Docket 12. USDA responded to that motion and stated that its reasons for the denial of specific

discovery were already expressed in the documents submitted in this case, and a *Vaughn* Index was not necessary. Docket 15. USDA also moved for summary judgment on the issue of whether it needed to provide FNS numbers and redemption totals to Argus Leader. Docket 18. The parties reached a stipulation that the issue of FNS numbers was no longer relevant, and the only issue before the court was whether USDA had to provide Argus Leader with the redemption data for the five years requested. Docket 31. The court approved the stipulation. Docket 32. On May 23, 2012, Argus Leader filed its opposition to the motion for summary judgment and claimed that the redemption data was not the type of information that was intended to be withheld under exemption 3. Docket 33.

STANDARD OF REVIEW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." (internal quotations omitted)). The moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

Once the moving party has met its initial burden, the nonmoving party must establish "that a fact . . . is genuinely disputed" either "by citing to particular parts of

materials in the record," or by "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c). "The nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). For purposes of summary judgment, the facts, and inferences drawn from those facts, are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

On a motion for summary judgment in a Freedom of Information Act case, the record is still viewed in the light most favorable to the nonmoving party to determine if issues of material fact remain in dispute to determine if "the moving party is entitled to judgment as a matter of law." *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008) (citations omitted). In FOIA cases, the agency has the burden to prove " 'that it has fully discharged its obligations under FOIA.' " *Id.* (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985) (citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983))). "Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved." *Mace v. E.E.O.C.*, 37 F. Supp. 2d 1144, 1146 (E.D. Mo. 1999) (citations omitted). *See also Nielsen v. U.S. Bureau of Land Mgmt.*, 252 F.R.D. 499, 503 (D. Minn. 2008) ("Summary judgment is the preferred procedural vehicle for resolving FOIA disputes.") (citing *Evans v. U.S. Dep't of Personnel Mgmt.*, 276 F. Supp. 2d 34, 37 (D.D.C. 2003)).

DISCUSSION

Argus Leader first argues that it is entitled to a *Vaughn* Index to understand USDA's explanation for the withholding of redemption data. USDA claims that the affidavits and other supporting documents have sufficiently stated its reasoning for denying the FOIA material, that the exemption being claimed is clear, and that an index is unnecessary. Argus Leader also claims that exemption 3 does not apply in this case because USDA cannot show that the claimed statute is a withholding statute or that the redemption data is the type of information that Congress meant to withhold under the claimed statute. USDA argues that § 2018(c) is clearly a withholding statute and that redemption data is information within the purview of 7 U.S.C. § 2018(c); therefore, the requested data was properly withheld under exemption 3.

I. *Vaughn* Index

Argus Leader argues that it is entitled to a *Vaughn* Index, which is a detailed list or index of the material withheld by USDA and usually contains a precise rationale of the reasons for withholding. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). "Although there are instances where *Vaughn* index may be necessary for proper review, a *Vaughn* index is not required as a matter of course." *May v. I.R.S.*, Civ. No. 90-1123, 1991 WL 328041, at *2 (W.D. Mo. 1991) (citing *Barney v. I.R.S.*, 618 F.2d 1268, 1272 (8th Cir. 1980)). *See also Minier v. Cent. Intelligence Agency*, 88 F.3d 796, 804 (9th Cir. 1996) ("[W]hen the affidavit submitted by an agency is sufficient to establish that the requested documents should not be disclosed, a *Vaughn* index is not required . . . Moreover, when a FOIA requester has sufficient information to present a full legal argument, there is no need for a *Vaughn* index.").

> The typical *Vaughn* Index:
>
> provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

Mo. Coal., 542 F.3d at 1209-10 (quoting *In re Dep't of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993)). *Vaughn* indices serve two purposes: (1) "to ensure an 'effectively helpless' party's right to information 'is not submerged beneath governmental obfuscation and mischaracterization,' " and (2) "to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.' " *Mo. Coalition*, 542 F.3d at 1209 (citing *Vaughn*, 484 F.2d at 826).

"Generally, a more substantial *Vaughn* index-one that provides for each document requested a specific explanation as to why an exemption applies–is preferable to a bare bones index." *Mo. Coalition*, 542 F.3d at 1210. Although courts routinely conduct an in camera review of the documents at issue, such inspection should be limited because it is " 'contrary to the traditional judicial role of deciding issues in an adversarial context upon evidence openly produced in court.' " *Barney*, 618 F.2d at 1272 (quoting *Cox v. U.S. Dep't of Justice*, 576 F.2d 1302, 1311 (8th Cir. 1978)). "If the material is fairly described and the reason for nondisclosure is adequately stated and supported by the law, the agency's position should be upheld without in camera inspection." *Mo. Coalition*, 542 F.3d at 1210 (citation omitted).

When analyzing whether an exemption to FOIA applies:

> A court's primary role . . . is to review the adequacy of the affidavits and other evidence presented by the Government in support of its position . . . . If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

Barney, 618 F.2d at 1272 (citing Cox, 576 F.2d at 1312). A *Vaughn* Index is not mandatory, but "[i]f the Court cannot evaluate the propriety of the claimed exemptions on the record before it, it may order the agency to submit more detailed affidavits or a *Vaughn* index, or even review documents *in camera*." *Gavin v. U.S. Sec. & Exch. Comm'n*, Civ. No. 04-4522, 2006 WL 2975310, at *2 (D. Minn. Oct. 16, 2006) (citing *Barney*, 618 F.2d at 1272; *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 n.2 (9th Cir. 1997); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). "Boilerplate or conclusory affidavits, standing alone, are insufficient to show that no genuine issue of fact exists as to the applicability of a FOIA exemption." *Mo. Coalition*, 542 F.3d at 1210 (citation omitted).

The affidavits submitted in this case by Susan Modine, Jennifer Weatherly, and Andrea Gold described redemption data in detail—how it is gathered, used, and why it should remain withheld. USDA specifically stated which exemptions to FOIA prevented disclosure and also discussed 7 U.S.C. § 2018, the statute that enumerates why the redemption data must be protected. And the

remaining data associated with the redemption data, like store name and other identifiers, was already provided to Argus Leader. Moreover, this is the type of case where a *Vaughn* Index would not improve Argus Leader's specific factual understanding of the documents sought because both parties know what is sought, and the redemption information is not a mystery to the agency or the requester. The information is a monetary amount that is redeemed each year for the grocery or wholesale food store in question. This is not the sort of information where a *Vaughn* Index would give the requester useful information that would help with the litigation because the information is a number and nothing more.[2]

The affidavits and briefs in support of USDA's motion were sufficient information for Argus Leader to make its legal argument and sufficient to aid the court in its legal determinations in this case. *See Mo. Coalition*, 542 F.3d at 1210 ("Such an index allows both the district court and the requesting party to evaluate the decision to withhold records and ensure compliance with FOIA."); *see also Miller*, 779 F.2d at 1387 (finding that an agency meets its burden by offering affidavits that explain why the documents were subject to an exemption). For these reasons, Argus Leader's request for a *Vaughn* Index is denied because it is unnecessary and duplicative in this case.

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[2] Because the information requested, redemption data, is one number for each store, the court finds that this information is not the type that is segregable. "In every case, the district court must make an express finding on the issue of segregability." *Missouri Coalition*, 542 F.3d at 1212 (citations omitted). The court finds that USDA already provided to Argus Leader the information that could be separated without triggering protection under the exemption and that the redemption data was reasonably separated from the remainder of the information at that time.

Now the court will analyze whether USDA properly withheld the redemption data under exemption 3, whether 7 U.S.C. § 2018 is properly classified as a withholding statute, and if redemption data is intended to be withheld under that statute.

II. Freedom of Information Act

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enforcement Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, ___ U.S. ____, 131 S. Ct. 1259, 1262 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 131 S. Ct. at 1262. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coalition*, 542 F.3d at 1208 (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden[3] is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993).

The exemption presently at issue is commonly known as FOIA exemption 3. This exemption exempts from disclosure matters that are precluded from release by another statute, if that statute either:

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[3] The agency retains the burden of justifying its decision to withhold any documents in light of the purposes of FOIA and to promote public access to government documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations omitted).

> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

5 U.S.C. § 552(b)(3)(A). "When determining whether FOIA exemption 3 is applicable, the court first decides if a statute is a withholding statute and then determines 'whether the information sought after falls within the boundaries of the non-disclosure statute.'" *Cent. Platte*, 643 F.3d at 1146 (quoting *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 332 (D.C. Cir. 1987)). "Exemption 3 is different from other FOIA exemptions because 'its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.'" *Id.* (citing *Goland v. C.I.A.*, 607 F.2d 339, 350 (D.C. Cir. 1978)).

USDA argues that 7 U.S.C. § 2018, which discusses the approval of retailers' participation in SNAP, is the withholding statute applicable to this case. The Eighth Circuit Court of Appeals has not expressly ruled upon whether § 2018 qualifies as an exempting or withholding statute under the two-part criteria mandated by § 552(b)(3), nor have any other district courts within the Eighth Circuit or elsewhere. First, the court must determine whether § 2018 is properly characterized as a withholding statute.

A. Withholding Statute

Because the court must determine whether the statute is a withholding statute that meets the requirements of exemption 3, the focus is whether there is clear language

within § 2018 that "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or provides criteria for withholding the information. 5 U.S.C. § 552(b)(3)(A)(i)-(ii). "To determine whether a statute is a withholding statute that prohibits disclosure, the court looks at the language of the statute on its face." *Zanoni v. U.S. Dep't of Agric.*, 605 F. Supp. 2d 230, 236 (D.D.C. 2009) (citing *Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987)). The language of the statute at issue provides:

> (c) Information submitted by applicants; safeguards, disclosure to and use by State agencies
>
> **Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter.** The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. **Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the**

> **provisions of this chapter** or the regulations issued pursuant to this chapter, except that such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C.A. § 1786], for purposes of administering the provisions of that Act [42 U.S.C.A. § 1771 et seq.] and the regulations issued under that Act. **Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.** The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

7 U.S.C. § 2018(c) (emphasis added).

The specific section that states that "[a]ny person who publishes, divulges, discloses, or makes known . . . any information obtained under this subsection shall be fined . . . or imprisoned[,]" directs that disclosure of information is prohibited and gives little discretion to the

agency as to how the information can be disseminated. 7 U.S.C. § 2018(c). Further, the language that gives the agency authority to promulgate regulations purports "to provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection[.]" Additionally, the only time that it is acceptable to release information obtained under the statute is if it is either for administrative or enforcement purposes or to investigate criminal activity. That restriction and the statutory language that discusses safeguarding or punishment for releasing information is the type of language that, on its face, is indicative of a withholding statute. *See* 5 U.S.C. § 552(b)(3) (requiring "that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]").

Additionally, Argus Leader does not specifically deny that § 2018 qualifies as a withholding statute; rather, its focus is that redemption data is not the type of information that was meant to be withheld under § 2018. Argus Leader admits that the language within § 2018 "arguably suffices to cross the Exemption 3's threshold." Docket 33 at 8. This admission, coupled with the plain language of the statute, leads to the conclusion that § 2018 would qualify as a withholding statute under exemption 3. The next inquiry is whether the yearly redemption data is the sort of information that Congress meant for USDA to withhold under the plain language of § 2018.

B. Information Within the Scope of Withholding Statute

Second, the court must determine whether the information sought after falls within the boundaries of the non-disclosure statute. The language of the statute at issue states that those food retail stores or wholesale food

concerns that wish to participate in SNAP must "submit information, which may include relevant income and sales tax filing documents[.]" 7 U.S.C. § 2018(c). It is immediately following this language that the first mention of withholding of information occurs within the statute. "Regulations issued pursuant to this chapter shall provide for safeguards which *limit the use or disclosure of information* **obtained** *under the authority granted by this subsection* to purposes directly connected with administration and enforcement of the provisions of this chapter . . .," except information provided to Federal or state law enforcement and investigative agencies. 7 U.S.C. § 2018(c) (emphasis added). The statute then describes the criminal punishment for any person who discloses, publishes, divulges, or makes known "*any information* **obtained** under this subsection."

The type of information that is to be withheld under the plain language of the statute is *any information*, which can include "relevant income and sales tax filing documents," that the federal government receives from a SNAP participant or a verifying agency or source. Thus, the precise question is whether redemption data or the amount of money that each store makes through SNAP purchases would satisfy any of these types of "information" noted in the statute or information that was obtained from a verifying agency via § 2018 authority.

Redemption data is the amount of SNAP benefits that are redeemed at a store in a given year, thus, the amount of money that the United States government credits to that retailer's bank account in a given year. SNAP beneficiaries have an EBT card, which acts similar to a debit card to purchase eligible food at certain stores authorized by FNS. For a transaction to occur, the customer swipes the EBT card in a point-of-sale device just like a debit card and enters a four-digit personal identification number. Docket 20 ¶ 9. The retail clerk

enters the amount of the purchase into the point-of-sale device and as long as the customer has sufficient balance to cover the cost, that amount is deducted[4] from the customer's EBT-SNAP account.

SNAP redemption data is either gathered by state EBT vendors or by subcontractors who provide the service. Docket 21 ¶¶ 19-20. State EBT vendors track and monitor SNAP benefit accounts, process any transactions, and eventually facilitate payment to the retail locations. Docket 21 ¶ 20. EBT vendors send files of all SNAP transactions to FNS, and retailers are identified solely by their unique FNS number. This information is loaded in the STARS database for sorting and filing and becomes the official record or redemption data for each retailer. Docket 21 ¶ 20. Soon after the customer's initial purchase, usually within two days, that same amount is credited to the retailer's bank account as redemption for the sale. Docket 20 ¶ 9. "This credit to the retailer's bank account is what" is known as redemptions. Docket 20 ¶ 9.

The way that FNS and other federal agencies use redemption data is to monitor compliance by participating retailers because excessive redemption amounts could be indicative of potential participation violations or could be a cause for sanctions. Docket 21 ¶ 21. FNS also uses redemption data to identify and remove retailers that are no longer actively participating in SNAP. "Redemption records are also an important element in the overall process of reconciling federal funds expended for SNAP."

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[4] The point-of-sale device communicates with a processor to electronically verify that the FNS number, or the unique identifier for that retailer within the SNAP and STARS database, is active and valid and that the customer has a sufficient balance to cover the purchase. Docket 21 ¶ 18. If either the FNS number is invalid or the balance is insufficient, then the transaction is denied at the point-of-sale. If both are accepted, then the transaction is authorized.

Docket 21 ¶ 21. Redemption data is inherently tied to FNS numbers or the unique identifying number assigned to retailers by FNS. All redemption data is attached to the retailer via that FNS number and the number is needed to process the original transaction and its subsequent repayment. Docket 21 ¶ 21.

USDA claims that "SNAP redemption data may only be disclosed as allowed by statute and that disclosure is limited to use connected with administration and enforcement of the provisions of the FNA or regulations issued pursuant to the FNA." Docket 21 ¶ 21. At specific points, the language of § 2018 refers to *any* information, or information obtained under the subsection, or "relevant income and sales tax filing documents." Redemption data is more than likely included under all three of those descriptions.

The language of § 2018 requires that applicants in SNAP submit information, including relevant income and sales tax filing documents, that allows the government to determine if the applicant qualifies or continues to qualify for participation in the SNAP program. This type of information, especially to determine if a retailer *continues* to qualify for SNAP participation, includes the amount of income (redemption data) each retailer derived from SNAP and the federal government. The government also has to verify tax information, which includes yearly income such as the redemption amount or benefits redeemed and paid to each retailer by the government. Although Congress has not expressly deemed redemption information as essential data to be included under § 2018, the statutory language encompasses this type of income and tax information because redemption data naturally falls under either term's broad umbrella. Because § 2018 is a withholding statute and redemption data is the type of information reached by the plain language of the statute, it was appropriate for USDA to withhold said data under

exemption 3 in light of the fact that the Argus Leader is not a state or federal law enforcement agency and was not conducting an internal agency audit.

Argus Leader argues that the redemption data is not included under § 2018 because that information is collected by state or outside businesses, who then send it to USDA and its subsidiaries to insert into the STARS system. Argus Leader claims that because the information is not provided by the retailers who are applicants for new or continued participation in SNAP, it is not included as "information" under § 2018. Argus Leader also asserts that because there is no request for redemption data on the application form for SNAP participation, the redemption data is outside the purview of the statute and not exempt under exemption 3. The court disagrees. As previously discussed, redemption data is the type of information that can be obtained under the authority of § 2018. The amount of EBT benefits a store provides or for which it is reimbursed is the type of information that retailers give to the federal government to continue its participation in SNAP or to renew its previously expired participation.

Because Congress established narrow criteria for when information under § 2018 could be released and redemption data is included under Congress's broad description of what constitutes "information" under § 2018, the redemption data was properly withheld. There are no genuine disputes of material fact. The court finds that USDA's decision to withhold the requested information was reasonable and exemption 3 applies; therefore, summary judgment is appropriate.

C. Legislative History

The court can also consider the legislative history of § 2018 in its consideration of whether the redemption data is the type that is meant to be withheld under exemption

3. *See N.L.R.B.*, 437 U.S. at 223-34 (looking to the legislative history to confirm the court's observation regarding the application of an exemption to FOIA). The legislative history of § 2018, which was amended in 1994 to expand the release of otherwise withheld information to law enforcement entities only, lends additional support to the court's conclusion that the redemption data was properly withheld.

Before the 1994 amendment to the Food Stamp Act of 1977, release of information under § 2018 was extremely restrictive. The purpose of the amendment was to "permit[] the use and disclosure of information provided by stores to State and Federal law enforcement and investigative agencies for the purposes of administering or enforcing the Food Stamp Act or any other Federal or State law and establishes penalties against persons who misuse any of the information[.]" Food Stamp Program Improvements Act of 1994, Pub. L. No. 103-225, H.R. Rep. No. 103-352, 1994 U.S.C.C.A.N. 39, 40. Prior to the 1994 amendment, the use of any of that information was restricted "to persons directly connected with the administration and enforcement of the Food Stamp Program" or those who administered WIC. *Id.* This language further demonstrates that all types of information that relate to tax, income, or redemption data that is correlated with participation in SNAP is to be withheld in all instances except internal administrative purposes or for law enforcement's use.

Under the plain language of § 2018, not only is the statute a withholding statute, but Congress intended to exempt redemption data from disclosure. For that reason, USDA has carried its burden and shown that exemption 3 applies to this case, and the agency properly withheld information that was covered under one of the narrow exemptions to the FOIA. *See Ray*, 502 U.S. at 173 ("Consistent with this purpose, as well as the plain

language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents."). There are no genuine issues of material fact in dispute, and summary judgment is appropriate.

CONCLUSION

Because USDA submitted detailed affidavits and briefs in support of its motion for summary judgment that justified its denial of the release of the redemption data records, the court finds that it is unnecessary and duplicative to require USDA to submit a *Vaughn* Index under the facts of this case. USDA has shown that § 2018 is a withholding statute under exemption 3 to the Freedom of Information Act. The plain language of the statute and its legislative history also indicates that redemption data is the type of information that was meant to be withheld under § 2018. USDA's decision to withhold the information was proper. Accordingly, it is

ORDERED that Argus Leader's motion for a *Vaughn* Index (Docket 12) is denied.

IT IS FURTHER ORDERED that USDA's motion for summary judgment (Docket 18) is granted.

Dated September 27, 2012.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121-KES

(Filed 09/27/12)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT

Pursuant to the Order Granting Defendant's Motion for Summary Judgment, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendant, United States Department of Agriculture, and against plaintiff, Argus Leader Media, d/b/a Argus Leader.

Dated September 27, 2012.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-3765

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellant

v.

United States Department of Agriculture

Defendant - Appellee

Appeal from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: October 23, 2013
Filed: January 28, 2014

Before RILEY, Chief Judge, COLLOTON and KELLY, Circuit Judges.

RILEY, Chief Judge.

Formerly known as the Food Stamp Program, the Supplemental Nutrition Assistance Program (SNAP or program) is one of America's largest and fastest-growing welfare arrangements: between 2007 and 2011, spending "more than doubled . . . from about $30 billion to $72 billion."[1] Amid increasing public scrutiny of this burgeoning program, a Sioux Falls, South Dakota, newspaper called the Argus Leader (Argus) wondered how much money individual retailers received from taxpayers each year through the program. Invoking the federal law meant to bring disclosure sunlight to the government bureaucracy, Argus requested this spending information from the U.S. Department of Agriculture (department or USDA) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Cf. Louis D. Brandeis, Other People's Money 92 (1914) ("Sunlight is said to be the best of disinfectants."). With little explanation, the department refused disclosure.

After an internal administrative appeal proved fruitless, Argus brought a FOIA suit in the District of South Dakota. The department moved for summary judgment, contending the information was exempt from disclosure under 5 U.S.C. § 552(b)(3)—known as FOIA Exemption 3—and 7 U.S.C. § 2018(c). Looking to legislative history and accepting the department's statutory interpretation, the district court found the spending information exempt from disclosure and granted the department's motion. Argus appeals. Concluding the statutory text plainly precludes the department from

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[1] Congr. Budget Office, The Supplemental Nutrition Assistance Program 5 (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/04-19-SNAP.pdf.

shielding the spending information under Exemption 3, we reverse.

I. BACKGROUND

The Food Stamp Act of 1964, Pub. L. No. 88–525, 78 Stat. 703, launched the program with a $75 million appropriation in its first year, rising to $200 million in its third. See id. § 16(a), 78 Stat. at 709. In fiscal year 2012, the program's total cost exceeded $78 billion, with more than 46 million people—over fifteen percent of the U.S. population—receiving benefits.[2] Most benefits go to needy families: 76 percent of SNAP households include "a child, an elderly person, or a disabled person" and "these households received 83 percent of all benefits."[3] An estimated $858 million per year is "trafficked," meaning "SNAP recipients sell their benefits for cash at a discount to food retailers," and approximately ten percent of participating retailers engage in trafficking.[4]

A. Administrative Proceedings

On February 1, 2011, Argus sent a letter to the department requesting "yearly redemption amounts, or EBT sales figures, for each store" participating in the program between fiscal years 2005 and 2010.

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[2] See Food & Nutrition Service (FNS), SNAP Monthly Data (Nov. 8, 2013), http://www.fns.usda.gov/pd/34SNAPmonthly.htm; FNS, SNAP Annual Summary (Nov. 8, 2013), http://www.fns.usda.gov/pd/SNAPsummary.htm; see also Phil Izzo, Food-Stamp Use Rises; Some 15% Get Benefits, Wall St. J., Aug. 9, 2013, http://blogs.wsj.com/economics/2013/08/09/food-stamp-use-rises-some-15- of-u-sgets-benefits.

[3] FNS, USDA, Characteristics of SNAP Households: Fiscal Year 2011, at xv (2012), available at http://www.fns.usda.gov/sites/default/files/2011Characteristics.pdf.

[4] USDA, The Extent of Trafficking in the SNAP: 2009-2011, at ii (2013), available at http://www.fns.usda.gov/sites/default/files/Trafficking2009.pdf.

Beneficiaries receive an electronic benefit transfer (EBT) card, which functions like a debit card. To use the card at a participating retailer, beneficiaries swipe their EBT card and enter a four-digit personal identification number at checkout. As with any other debit card transaction, a third-party processor deducts the transaction amount from the beneficiary's account and credits it to the retailer's account. Such third-party processors "handle and track [program] benefit accounts," then send transaction data to the department. Although the days when retailers had to redeem physical food stamps have long passed, the department still refers to this electronic process as a "redemption." After receiving transaction data from the third-party processors, the department loads each retailer's aggregated data into a government database.

The department appears to concede that it could use this database to supply the information requested by Argus. The department simply refuses to do so. In an undated letter received February 17, 2011, the department revealed the names and addresses of all participating retailers, but withheld "all other information . . . under 5 U.S.C. [§] 552(b)(3) and (b)(4)." In a letter dated February 25, 2011, Argus appealed this withholding. The department denied the appeal in another undated letter.

B. Article III Proceedings

On August 26, 2011, Argus filed a complaint under 5 U.S.C. § 552(a)(4)(B) in federal court seeking to compel the department to provide the withheld information. The department moved for summary judgment, invoking Exemption 3, 5 U.S.C. § 552(b)(3).

On September 27, 2012, the district court granted the department's motion. First, the district court decided 7 U.S.C. § 2018 qualified as a withholding statute under

Exemption 3. Second, the district court found the retailer spending information was exempt from disclosure because it was "the type of information that can be obtained under the authority of § 2018"—though, in practice, it is not obtained from the individual retailers. (Emphasis added). Consulting legislative history, the district court thought a 1994 amendment to § 2018 "demonstrate[d] that all types of information that relate to tax, income, or redemption data that is [sic] correlated with participation in [the program] is to be withheld in all instances except internal administrative purposes or for law enforcement's use." The district court determined the department was entitled to withhold the data. Argus appeals, invoking our jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

We "perform[] a *de novo* review of the grant of summary judgment in a FOIA case." Mo. ex rel. Garstang v. U.S. Dep't of Interior, 297 F.3d 745, 749 (8th Cir. 2002). A government agency is not entitled to summary judgment in a FOIA case unless "the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." Miller v. U.S. Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985). "In order to discharge this burden, the agency 'must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is *wholly exempt* from the Act's inspection requirements.'" Id. at 1382-83 (emphasis added) (quoting Nat'l Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

A. Statutory Text

"Our analysis begins, as always, with the statutory text." United States v. Gonzales, 520 U.S. 1, 4 (1997). The

relevant text of FOIA Exemption 3 allows agencies to withhold information that is

> *specifically exempted* from disclosure by statute (other than [5 U.S.C. § 552b]), if that statute—
>
> (A)(i) *requires* that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) *establishes* particular criteria for withholding or refers to particular types of matters to be withheld[.[5]]

5 U.S.C. § 552(b)(3) (emphasis added). The department contends the spending information is "specifically exempted" by 7 U.S.C. § 2018(c). Argus does not dispute that § 2018(c) is a withholding statute (i.e., one that "requires," "establishes," or "refers" to non-discretionary or particular withholding of information).

Instead, Argus challenges the district court's conclusion that program spending information falls within the withholding contemplated by § 2018(c). Again, we look to the relevant statutory text:

> (c) Information *submitted by applicants*; safeguards; disclosure to and use by State agencies
>
> Regulations issued pursuant to this chapter shall require *an applicant retail food store or wholesale food concern to submit information*, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to *whether such applicant qualifies, or continues to qualify*, for approval . . . . Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of

[5] There is one additional requirement not applicable to this case.

> *information obtained under the authority granted by this subsection* . . . . Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any *information obtained under this subsection* shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

7 U.S.C. § 2018(c) (emphasis added).

Because the retailer spending information is not "submit[ted]" by "an applicant retail food store or wholesale food concern," id., the information is not exempt from disclosure. The department, not any retailer, generates the information, and the underlying data is "obtained" from third-party payment processors, not from individual retailers. See, e.g., Brian A. Garner's Modern American Usage 74 (3d ed. 2009) (defining "obtain" as "to get, acquire"); Webster's Third New Int'l Dictionary 1559 (1993) (defining "obtain" as "to gain or attain possession or disposal of"). Neither of the forms used to determine whether a given retailer "qualifies" or "continues to qualify" as a program participant asks for the spending information. These plain textual reasons for rejecting the department's position mean we need not rely on the Supreme Court's admonition that FOIA exemptions "must be 'narrowly construed,'" Milner v. Dep't of Navy, 562 U.S. ____, ____, 131 S. Ct. 1259, 1262 (2011) (quoting FBI v. Abramson, 456 U.S. 615, 630 (1982)), to conclude retailer spending information is not "obtained under the authority granted by" § 2018(c).

Our plain reading is further confirmed by the subsection heading, which refers to "Information *submitted by applicants*." 7 U.S.C. § 2018(c) (emphasis added). A subsection "heading cannot substitute for the operative text of the statute." Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008). But

"statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" Id. (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002)). Even if the statutory text left any ambiguity, the heading would resolve that doubt in favor of disclosure.

The district court's contrary conclusion stemmed from a misreading of the statute. First, the district court singled out the term "any information," interpreting the statute to require withholding of all information—regardless of its source—used to determine whether "a retailer qualifies or continues to qualify for participation in the [program]." Yet the statute makes clear that only information obtained under § 2018(c)—submitted by a retailer—is exempted. When the statute says "obtained" it means "obtained," not "can be obtained," as the district court reasoned. (Emphasis added). "Congress expresses its purpose by words. It is for [courts] to ascertain—neither to add nor to subtract, neither to delete nor to distort." 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951). Here, however else the spending information could be obtained, the department actually obtained it from third-party payment processors, not the retailers themselves.

Second, the district court thought the spending information qualified as "relevant income and sales tax filing documents." The district court opined, "Although Congress has not expressly deemed redemption information as essential data to be included under § 2018, the statutory language encompasses this type of income and tax information because redemption data naturally falls under either term's broad umbrella." Again, the district court departed from the plain text of the statute, which refers to "income and sales tax *filing documents*." 7 U.S.C. § 2018(c) (emphasis added). These words—confirmed by the requirement to "provide written authorization for the Secretary to verify all relevant tax

filings with *appropriate agencies*"—plainly refer to tax documents filed with relevant state, local, and federal tax authorities. Id. (emphasis added). Echoing the Supreme Court, we "have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (internal quotation omitted); see, e.g., Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc., 651 F.3d 857, 862 (8th Cir. 2011). The spending information is not a tax filing document, so the district court's "broad umbrella" cannot shade the spending information from the sunlight.

B. Statutory History

Although "the authoritative statement is the statutory text, not the legislative history," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), we recognize that the district court relied in part on the legislative history. While resolving this case purely on textual grounds, we observe "for those who find legislative history useful," United States v. Tinklenberg, 563 U.S. ____, ___, 131 S. Ct. 2007, 2015 (2011), that this history is more fairly read to support Argus' position.

First, Congress has clearly indicated its intent to involve the public in counteracting fraud perpetrated by retailers participating in the program. See, e.g., Food Stamp and Commodity Distribution Amendments of 1981, Pub. L. No. 97–98, § 1314, 95 Stat. 1213, 1285 (codified as amended at 7 U.S.C. § 2018(e)).

Second, the statutory history reveals that redemptions were historically governed not by § 2018(c), but by an entirely different section: 7 U.S.C. § 2019. See Food Stamp Act of 1977, Pub. L. No. 95–113, sec. 1301, § 10, 91 Stat. 913, 969 (codified as amended at 7 U.S.C. § 2019).

Thus, Congress apparently never expected the department to obtain redemption data, used to generate the requested spending information, "under the authority granted by [§ 2018(c)]." 7 U.S.C. § 2018(c).

Noting the history of § 2018(c) but relying on its plain text, we conclude Exemption 3 cannot prevent Argus from "pierc[ing] the veil of administrative secrecy and . . . open[ing] [the department's] action[s] to the light of public scrutiny." Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotation omitted).

III. CONCLUSION

We reverse and remand for further proceedings consistent with this opinion.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3765

(Filed 01/28/14)

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellant

v.

United States Department of Agriculture

Defendant - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 28, 2014

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 09/30/15)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Argus Leader Media, d/b/a Argus Leader, brought this action under the Freedom of Information Act (FOIA) against defendant, United States Department of Agriculture (USDA), seeking disclosure of information related to the Supplemental Nutrition Assistance Program (SNAP), formerly known as the food stamp program. Docket 1. USDA moves for summary judgment and argues that its decision to withhold information is supported by exemptions 4 and 6 to the FOIA. Docket 61. Argus Leader resists USDA's motion and argues neither

exemption applies. Docket 73. For the following reasons, USDA's motion for summary judgment is denied.

BACKGROUND

The facts viewed in the light most favorable to Argus Leader are as follows:

On February 1, 2011, Argus Leader made a FOIA request for documents from the Food and Nutrition Service (FNS), which is an agency of the USDA. FNS administers the Food and Nutrition Act of 2008 and other federal statutes designed to facilitate the operation of SNAP. Argus Leader's request for information sought SNAP retail store records from 2005 through 2010 that included: each store's identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer (EBT[1]) sales figures for each participating store. Docket 60 at 3. At this point in the litigation, Argus Leader only seeks information about the yearly redemption amounts paid to each participating store. All other data was either provided to Argus Leader or deemed nonessential by Argus Leader.

The Benefit Redemption Division (BRD), a component within FNS, oversees an EBT system which allows SNAP beneficiaries to use their SNAP benefits at participating retailers. Through the EBT system, BRD is able to track each SNAP beneficiary's account and ensure that each retailer is paid for SNAP purchases. The EBT system functions like other debit cards. A SNAP beneficiary is given an EBT card. At checkout, the SNAP beneficiary

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[1] The term food stamps is the label for SNAP benefits that is most familiar to the public. Docket 21 ¶ 7. Many store owners or clients also know or understand their benefits as "EBT," and FNS often uses SNAP-EBT in its publications and information. Food stamps, SNAP, and SNAP-EBT all mean the same thing. Docket 21 ¶ 7.

swipes his or her EBT card on the store's point-of-sale device. The device then communicates with a processor and electronically verifies that the retailer is a SNAP participant and that the SNAP beneficiary has a sufficient balance in his or her account to cover the purchase. If the retailer is not a SNAP participant or there are insufficient funds in the beneficiary's account, the transaction is denied at the point-of-sale.

All of the SNAP payment information that is generated is stored in a technology system overseen by BRD called the Store Tracking and Redemption System (STARS). Redemption data is obtained only when a retailer is authorized to accept SNAP cards and processes a SNAP transaction. Redemption data is generated for each retailer only during the time frame that the retailer would be authorized to participate in SNAP. The STARS system keeps track of the total amount of EBT dollars spent at a participating SNAP retailer in a given year. For instance, if a SNAP retailer is authorized to participate in the program but makes no EBT sales, then the redemption data amount is $0. Argus Leader seeks to recover this store specific data.

On February 1, 2011, Argus Leader made its request for documents from FNS. After receiving Argus Leader's request, FNS contacted BRD to collect the data that Argus Leader sought. BRD conducted a search within the STARS database and gathered records that were pertinent to the request but not subject to a FOIA exemption. BRD produced a CD that contained 321,988 SNAP files viewable on a Microsoft Excel worksheet. FNS sent that CD and a letter to Argus Leader and explained that the agency was not including some of the requested information (like redemption data) because those records were exempt from disclosure pursuant to the FOIA exemptions 3 and 4, codified at 5 U.S.C. § 552(b)(3) and (b)(4). Docket 22 ¶ 15. FNS also informed

Argus Leader of its right to appeal. Argus Leader contacted a representative for FNS and stated that it had received the letter, but the CD only contained 65,536 retailer records. Argus Leader also requested that FNS resend the information in a text format.

On March 3, 2011, Argus Leader appealed FNS's decision to withhold the redemption data to the FNS Freedom of Information Act Service Center within the Information Management Branch. The appeal worked its way through internal departments and eventually was submitted for legal review on April 13, 2011. On June 13, 2011, FNS received a letter from Argus Leader stating that it would initiate legal action under FOIA if it did not receive a response to its appeal within ten days. Docket 22 ¶ 26. On July 19, 2011, Argus Leader received an unofficial response from FNS via email that attempted to clarify why the requested information was withheld. Meanwhile, the appeal denial was prepared for final signatures from those who could officially deny the appeal.

Argus Leader filed its complaint in this court on August 26, 2011, and the denial of Argus Leader's administrative appeal was never sent. Docket 1. USDA moved for summary judgment on the issue of whether it needed to provide FNS numbers and redemption totals to Argus Leader. Docket 18. The parties stipulated that the issue of FNS numbers was no longer relevant and the only issue remaining before the court was whether USDA had to provide Argus Leader with the redemption data for the five years requested. Docket 31. The court approved the stipulation. Docket 32. On May 23, 2012, Argus Leader filed its opposition to the motion for summary judgment with regard to the remaining issue and claimed that the redemption data was not the type of information that was intended to be withheld under exemption 3 to the FOIA. Docket 33. The court ruled in favor of USDA and found that exemption 3 applied to the requested data. On March

25, 2014, the Eighth Circuit Court of Appeals reversed and held that exemption 3 did not apply. Docket 44.

After the Court of Appeals' ruling, the USDA published a request for information in the Federal Register on August 4, 2014. FNS contacted SNAP retailers to determine whether SNAP retailers thought disclosure of aggregated SNAP redemption data for individual stores should be disclosed. Of the 321,988 potential SNAP retailers contacted, only 323 responded, and 73 percent of respondents were opposed to disclosing individual store redemption data.

USDA followed up with fifteen SNAP retailers that filed affidavits stating why individual store redemption amounts should not be disclosed. Affiants stated the disclosure of individual store data could cause predatory competition, put a stigma on SNAP retailers, and cause other commercial harms. After receiving this data, USDA filed its second motion for summary judgment arguing that exemptions 4 and 6 to the FOIA applied to the requested information. Docket 58; Docket 61.

STANDARD OF REVIEW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." (internal quotations omitted)). The moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute. *Hartnagel v.*

Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

Once the moving party has met its initial burden, the nonmoving party must establish "that a fact . . . is genuinely disputed" either by "citing to particular parts of materials in the record," or by "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c). "The nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). For purposes of summary judgment, the facts and inferences drawn from those facts are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

On a motion for summary judgment in a FOIA case, the record is still viewed in the light most favorable to the nonmoving party to determine if issues of material fact remain in dispute and to determine if "the moving party is entitled to judgment as a matter of law." *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1209 (8th Cir. 2008) (citations omitted). In FOIA cases, the agency has the burden to prove " 'that it has fully discharged its obligations under FOIA.' " *Id.* (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985)).

DISCUSSION

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enf't Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, 562 U.S.

562, 565 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 562 U.S. at 565. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coalition*, 542 F.3d at 1208 (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden[2] is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993).

I. Exemption 4

USDA argues it is not required to disclose yearly redemption amounts for individual SNAP retailers because such information would be "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit Court of Appeals has explained that exemption 4 applies to "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975). Information is confidential if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the

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[2] The agency retains the burden of justifying its decision to withhold any documents in light of the purposes of FOIA and to promote public access to government documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations omitted).

information was obtained." *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).[3] This test, which the Eighth Circuit Court of Appeals adopted, is commonly known as the *National Parks* test. This test "has been widely recognized and applied by the circuit courts when construing Exemption 4." *Id.*

In its most recent opinion about exemption 4, the Eighth Circuit Court of Appeals stated, "To claim an exemption [under exemption 4], an agency must 'provide affidavits which justify the claimed exclusion of each document by correlating the purpose for exemption with the actual portion of the document which is alleged to be exempt.'" *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015) (quoting *Miller*, 779 F.2d at 1387 (8th Cir. 1985)). "[G]eneralized allegations cannot establish that disclosure of financial reports would cause substantial competitive harm." *Contract Freighters*, 260 F.3d at 863. If each element of the exemption is not met, then the exemption does not apply.

When viewing the facts in a light most favorable to Argus Leader, summary judgment must be denied. Under the *National Parks* test, USDA must show that disclosure of an individual store's yearly redemption data is likely "to cause substantial harm to the competitive position" of the individual store. Because USDA received a small percentage of responses from SNAP retailers,

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[3] Another test is used if the person or entity submitting information is doing so voluntarily. That test is inapplicable here, however, because SNAP retailers are required to disclose EBT data if they want to be compensated. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (holding a bid to do government work is not voluntary under exemption 4 because the bid must be submitted in order to win the contract).

there is evidence that supports the inference that the majority of SNAP retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data. A reasonable fact-finder could also find that a number of factors influence marketplace competition and that simply disclosing the amount of EBT dollars spent at a particular location is not sufficient to influence the marketplace. Because there is a reasonable dispute as to whether the disclosure of individual store redemption data is likely to cause substantial competitive harm to SNAP retailers, summary judgment is denied.[4]

II. Exemption 6

USDA further argues that exemption 6 applies to at least "individual retailer redemption data of sole proprietor and closely held corporations . . . ." Docket 61 at 31. Under 5 U.S.C. § 552(b), government agencies may decline to disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As explained by the Eighth Circuit Court of Appeals, the heart of the analysis is a balancing test between "the privacy interest of the individual against the public interest in disclosure." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1185 (8th Cir. 2000); *see also Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229-33 (D.C. Cir. 2008) (using a four step analysis that balances the individual's privacy interest against the public's interest in disclosure). USDA argues disclosure of individual store redemption data could reveal private information about "at least a portion of the owner's personal finances" and that disclosure could

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[4] It should be noted that the disclosure of individual store redemption data may not affect each store in the same way. For example, disclosing individual store data to the public could benefit certain SNAP retailers. Therefore, USDA must specifically state how the disclosure of SNAP data could adversely affect specific stores.

also cause competitive harm to these businesses. Docket 61 at 33 (quoting *Multi Ag Media*, 515 F.3d at 1229-30). USDA also argues that such disclosure outweighs the public's interest because the public already has access to redemption data broken down into region, state, county, and zip code (when available). *Id.* at 35.

When viewing the facts in the light most favorable to Argus Leader, summary judgment cannot be granted. There is evidence that the public's interest in disclosure outweighs the individual's privacy. For example, disclosure of individual store redemption data does not disclose individual finances because the data would not disclose what percentage of the retailer's sales are credited to SNAP or how much the retailer profits after deducting expenses. *See Multi Ag Media*, 515 F.3d at 1229-33. Additionally, as stated above, a reasonable fact-finder could conclude that there is no threat of competitive harm with the disclosure of individual store data. Also, there is a great public interest in full disclosure of the parameters of the SNAP program. When weighing the interests of retailers against the public's interest in a transparent government, the latter prevails. Thus, summary judgment is denied as to exemption 6.

CONCLUSION

Because questions of fact remain on the issues of whether substantial competitive harm is likely if individual store redemption data is disclosed and whether individual privacy interests outweigh the public's interest in a transparent government, summary judgment is denied. Accordingly it is

ORDERED that USDA's motion for summary judgment (Docket 58) is denied.

Dated September 30th, 2015

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 01/30/17)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant,

FOOD MARKETING INSTITUTE,

Intervenor.

ORDER GRANTING EMERGENCY MOTION TO INTERVENE, STAY JUDGMENT, AND EXTEND TIME TO FILE AN APPEAL

Intervenor, Food Marketing Institute (FMI), brings this emergency motion to intervene in this litigation, to stay the court's November 30, 2016 judgment, and to extend the deadline to file a notice of appeal. Argus has

responded to FMI's motions, and the court grants FMI's motions.

BACKGROUND

Argus Leader Media filed a complaint on August 26, 2011, seeking data on the Supplemental Nutrition Assistance Program (SNAP) that is administered by the United States Department of Agriculture (USDA). Docket 1. USDA opposed disclosure of the requested data. The issue before this court was whether Argus was entitled to the data under the Freedom of Information Act (FOIA). During the course of litigation, USDA filed its first motion for summary judgment, limiting its argument to FOIA Exemption 5. Dockets 18 and 23. The court granted USDA's motion and entered judgment in favor of USDA. Dockets 38 and 39. Argus appealed the court's ruling, and the Eighth Circuit Court of Appeals reversed this court's decision and remanded the case for further proceedings. Dockets 44 and 45.

USDA then filed its second motion for summary judgment, arguing that FOIA Exemptions 4 and 6 applied to Argus's request for SNAP data. Dockets 58 and 61. USDA later withdrew its contention that FOIA Exemption 6 applied. Docket 99 at 1. The court denied USDA's motion for summary judgment. Docket 80. On May 25, 2016, the court began a bench trial on whether Exemption 4 applied to Argus's request. Dockets 99 and 111. Following trial, the court ruled on November 30, 2016, that FOIA Exemption 4 did not apply. Dockets 127 and 128. Throughout the litigation of this case, USDA has argued that Argus's request for SNAP data should be denied.

On January 19, 2017, USDA notified SNAP-authorized retailers that, based on the court's judgment, USDA will disclose the requested SNAP information to Argus. Docket 139 at 2. Members of the Food Marketing

Institute (FMI)—who are also authorized SNAP retailers—now object to USDA's release of the SNAP data. *Id.* FMI moves to intervene in this case and requests that the court stay its judgment and extend the deadline to file an appeal. Docket 138.

MOTION TO INTERVNE

FMI seeks to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Because the court grants FMI's motion on these grounds, the court does not address FMI's argument that it may permissively intervene under Federal Rule of Civil Procedure 24(b)(1)(B).

I. LEGAL STANDARD

For a party to intervene in litigation, the party must establish Article III standing and satisfy the requirements of Rule 24. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996)). To establish Article III standing, a party "must clearly allege facts showing an injury in fact, which is an injury to a legally protected interest that is 'concrete, particularized, and either actual or imminent.'" *Id.* at 834 (citing *Curry v. Regent of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999)). "An association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Owner–Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 831 F.3d 961, 967 (8th Cir. 2016) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

A party has a right to intervene in litigation under Rule 24 if the following criteria are met: "(1) [the party] has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties." *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (citing *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997)).

Rule 24 also requires that the party file a timely motion. Fed. R. Civ. P. 24. To determine whether a motion is timely, the court considers (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Academy*, 643 F.3d 1088, 1094 (8th Cir. 2011) (citing *United States v. Ritchie*, 620 F.3d 824, 832 (8th Cir. 2010); *see also United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995)).

II. DISCUSSION

A. Article III standing

In *American Farm Bureau Federation v. EPA*, 836 F.3d 963 (2016), the Eighth Circuit Court of Appeals addressed the requirements for standing for associations. The court held that the American Farm Bureau Federation and the National Pork Producers Council had standing to challenge the release of their members' personal data under FOIA. *Id.* at 968. The Eighth Circuit reasoned that the federal government's "nonconsensual dissemination of personal information" was a sufficient basis to establish a "concrete and particularized injury in fact," giving the associations standing. *Id.* at 968.

Based on *Farm Bureau*, this court finds that FMI has established Article III standing. Similar to the associations in Farm Bureau, FMI has shown that its members would otherwise have standing to sue in their own right because of the potential nonconsensual dissemination of private information. The private nature of the information and its potential disclosure gives FMI members a concrete, particularized legal interest to protect. FMI has also shown that the interests it seeks to protect are germane to FMI's purpose. FMI is an organization that "advocates for food retailers" and "their commercial interests," and the release of SNAP data directly impacts those commercial interests. Docket 139 at 4. Lastly, FMI has shown that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. FMI is appealing the application of a FOIA exemption, and the court is able to rule on the application of the exemption without testimony of FMI members. For these reasons, FMI has established Article III standing.

B. Rule 24(a)(2) requirements

FMI has also met the requirements of Rule 24(a)(2). FMI's motion is timely because the association only recently discovered that USDA would not be appealing this court's ruling. Although much of the litigation has already been completed, FMI's interests were sufficiently represented by USDA. It was not until USDA decided to refrain from filing an appeal that FMI needed to intervene. Nothing about the litigation up to this point would have changed if FMI had been a party from the outset. Because FMI has a valid reason for its delay in seeking intervention and no prejudice will result, the court finds that FMI's motion is timely. Furthermore, FMI has an interest in the subject matter of this litigation because its members are directly impacted by the release of the

requested SNAP information. FMI's interest in protecting its members' financial data would be impaired by USDA's decision to disclose the data and not appeal this court's ruling, and USDA no longer represents FMI's interests because USDA plans to release the requested SNAP data. Because both the requirements of Article III and Rule 24 are met, FMI may intervene in this case.

MOTION TO STAY JUDGMENT

I. LEGAL STANDARD

When ruling on a motion for a stay pending appeal, the court must consider (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) the threat of irreparable harm to the moving party absent a stay; (3) whether issuance of a stay pending appeal would substantially injure the other parties in the proceeding; and (4) the effect on the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also Iowa Utils., Bd. v. FCC*, 109 F.3d 418, 424 (8th Cir.1996). The Second Circuit Court of Appeals and the Sixth Circuit Court of Appeals have recognized that "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). Or "[s]imply stated, more of one excuses less of the other." *Id.* (quoting *Griepentrog*, 945 F.2d at 153; *cf. In re Reval AC, Inc.*, 802 F.3d 558, 569-73 (3d Cir. 2015) (finding factors are interconnected).

II. DISCUSSION

The issue before the court was whether FOIA Exemption 4 applied to individual SNAP retailer redemption data. The issue appears to be one of first impression in the Eighth Circuit Court of Appeals.

Because there is not a clearly established answer to this issue, FMI could succeed in an appeal. The disclosure of the requested SNAP data could also cause irreparable harm to FMI members—that is the issue FMI seeks to appeal. And once the data is disclosed, it cannot be unseen. In contrast, Argus and the public will not suffer irreparable harm if the data is not disclosed immediately. Assuming Argus prevails on appeal, Argus will have access to the SNAP data and will be able to publish news articles based on the information. Any harm would be temporary and not irreparable. Based on these considerations, the court grants FMI's motion to stay judgment.

Federal Rule of Civil Procedure 62(d) also states that "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond." Here, FMI's motion to stay judgment and desire to appeal directly impacts the litigation expenses Argus must incur. Because Argus may be able to recover attorney fees if it prevails on appeal, this court orders that FMI post a $20,000 bond. The stay will take effect upon posting of the bond.

MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

FMI moves for a 30-day extension to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(A). Because FMI did not learn of its need to intervene in this case until January 19, 2017, good cause exists to give FMI a 15-day extension to file its appeal.

CONCLUSION

This court grants FMI's motion to intervene because FMI has established Article III standing and has met the

requirements of Rule 24(a)(2). The court stays its judgment in this case pending review by the Eighth Circuit Court of Appeals because of the potential irreparable harm disclosure of the requested information could cause FMI members, and FMI is required to post a $20,000 bond. The court also grants FMI's motion for a 15-day extension to file an appeal.

DATED this 30th day of January, 2017.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 08/07/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

Appellant's motion to stay the mandate, appellee's response and appellant's reply have been considered by the court and the motion is denied.

August 07, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX L

Supreme Court of the United States

No. 18A146

FOOD MARKETING INSTITUTE,

Applicant

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 17-1346, is hereby recalled and stayed pending further order of the undersigned or of the Court. It is further ordered that a response to the application be filed on or before Thursday, August 16, 2018, by 4 p.m. The reply, if any, is to be filed by 4 p.m., Tuesday, August 21, 2018.

/s/ Neil M. Gorsuch
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of August 2018.

APPENDIX M

(ORDER LIST: 585 U.S.)

WEDNESDAY, AUGUST 29, 2018

ORDER IN PENDING CASE

18A146 FOOD MARKETING INST. V. ARGUS LEADER MEDIA

The application to recall and stay the mandate, presented to Justice Gorsuch and by him referred to the Court, is granted, and the mandate of the United States Court of Appeals for the Eighth Circuit in case No. 17-1346 is recalled and stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice Ginsburg, Justice Sotomayor, and Justice Kagan would deny the application.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 08/29/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of
South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

Pursuant to an order of the U.S. Supreme Court, dated August 29, 2018, the mandate is hereby recalled and stayed pending the disposition of a petition for writ of certiorari.

August 29, 2018

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 07/13/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX P

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civ. 11-4121

ARGUS LEADER MEDIA, dba ARGUS LEADER,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Excerpts from Transcript of Court Trial held May 24-25, 2016, before the Honorable Karen E. Schreier, U.S. District Court Judge, at the U.S. District Courthouse in Sioux Falls, South Dakota

---

APPEARANCES:

MR. JON E. ARNESON, Attorney at Law, 123 S. Main Avenue, Suite 202, Sioux Falls, South Dakota 57104, appearing on behalf of the Plaintiff.

MS. STEPHANIE C. BENGFORD, U.S. Attorney's Office, P.O. Box 2638, Sioux Falls, South Dakota 57101-2638, appearing on behalf of the Defendant.

MR. DAVID K. GASTON and MS. CHU-YUAN HWANG, U.S. Department of Agriculture, 1400

Independence Avenue, S.W., Room 3311, Washington, DC 20250, appearing on behalf of the Defendant.

* * *

[230] MR. ARNESON: So competition is good for America, but not too much competition?

MR. JOHNSTONE: I don't think I'm saying that. I'm saying that information that we consider proprietary and confidential that we submitted to the [231] Government, with the understanding that it would be kept confidential, we're concerned that the release of that will cause us substantial competitive harm. You can say that that's the impact of the free market, if that's your view. All I can say is we are concerned about what we think the likely negative effects are of the release of the information, which is information we keep confidential and we don't disclose to anyone.

MR. ARNESON: Okay. I would agree then that -- let me see if I can state this. You're saying that the Kmart attitude is this information is proprietary, confidential, secret. Yet, is it not the payment under a Government program?

MR. JOHNSTONE: It is.

* * *

[291] MS. BENGFORD: And so then its actual SNAP sales individual store data, you believe that's a key piece?

MR. LARKIN: Absolutely.

MS. BENGFORD: And why is that?

MR. LARKIN: Because anybody that wants to locate a new store or compete with their current competitor now knows, you know, X number of dollars are available that are going to that competitor, and they're going to do

everything they can to capture for that percentage, whatever they can, out of that dollar amount.

[292] In today's world, they have ways of guessing. They have ways of estimating. They have market research they can do. But there is no place where they can get the actual data. And when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released.

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act exempts from the FOIA's disclosure obligation "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit determined that Exemption 4 does not shield from release information generated and compiled by the government regarding the amounts of federal money disbursed to food retailers under the Supplemental Nutrition Assistance Program.

The petition raises three questions:

1. Should this Court jettison the objective approach to determining whether commercial information is "confidential" under Exemption 4, which every circuit that has addressed the issue has adopted, in favor of a subjective standard, which no circuit has adopted?

2. Did the Eighth Circuit correctly hold that the information sought here is not "confidential" under Exemption 4, where the evidence showed that disclosure would provide no material insight into any aspect of a retailer's business?

3. Does information generated and compiled by the government, regarding the disbursement of government funds, qualify as "obtained from a person" under Exemption 4, if some of the underlying data were obtained by third-party payment processors that effected transactions using federal money?

CORPORATE DISCLOSURE STATEMENT

Gannett MHC Media, Inc. is the corporate parent of the Argus Leader. The parent of Gannett MHC Media, Inc. is Gannett Co., Inc. Gannett Co., Inc. is a publicly traded company. Black Rock, Inc., a publicly traded company, owns ten percent or more of the stock of Gannett Co., Inc.

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INTRODUCTION

In its petition, the Food Marketing Institute urges this Court to take up a question on which it acknowledges there is no circuit split, in order to adopt a position that it concedes no court of appeals has ever adopted.

The Freedom of Information Act (FOIA) provides for access to records that enable the public to see what their government is doing. There are limited exceptions to FOIA's broad right of access to government information. One exception—Exemption 4—applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). More than four decades ago, the D.C. Circuit concluded that, to determine whether "commercial or financial information obtained from a person" qualifies as "confidential" under that provision, courts should look, in part, at whether disclosure is "likely ... to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Since then, as Petitioner concedes, nearly every circuit has agreed with that standard; no circuit has rejected it. Pet. 14.

Petitioner's first question presented, therefore—which invites this Court to jettison this interpretation of "confidential" commercial information in favor of a new, subjective formulation, which no circuit has embraced—reflects the quintessential situation in which certiorari is *not* warranted: Petitioner argues that this Court should take up the *National Parks*

interpretation of "confidential" not because lower courts disagree about whether it is correct, but because the interpretation has been too widely and uniformly adopted. And though Petitioner offers up a second question presented, which purports to identify a conflict arising from the application of the *National Parks* interpretation, no such conflict exists. No circuit has adopted either of the two positions that Petitioner claims constitute that "circuit split."

Even if this Court were inclined to take up Petitioner's invitation to assess the lower courts' uniform and long-established interpretation of "confidential" commercial information under Exemption 4, this case would be a peculiarly bad vehicle for doing so. Exemption 4 applies to "commercial or financial information obtained from a person." The exemption operates in circumstances where private parties provide the government with their own, non-publicly disseminated materials. This case, by contrast, arose when a journalist at a local paper made a FOIA request to the U.S. Department of Agriculture for information relating to the amounts of federal funds disbursed to grocery stores under the government's Supplemental Nutrition Assistance Program (SNAP). The case, then, involves a request for the government's *own information*, compiled and stored on the government's own databases, relating to the government's own spending. Because this case does not involve the sort of information that is covered by Exemption 4, it provides no opportunity for this Court to address Petitioner's generalized objections to the way in which lower courts have consistently interpreted "confidential" commercial information under Exemption 4.

The petition should be denied.

STATEMENT OF THE CASE

1. The Supplemental Nutrition Assistance Program (SNAP), formerly known as the food stamp program—is a government program that subsidizes the purchase of groceries for low-income families. *See* 7 U.S.C. § 2013. It is administered by the Food and Nutrition Service, a component of the U.S. Department of Agriculture (USDA). *See* 7 C.F.R. § 271.3(a).

Historically, the program operated via coupons—called food stamps—that were printed by the Treasury Department's Bureau of Printing and Engraving in various denominations and issued to qualifying households. Those food stamps could be used to purchase eligible products at retail food stores. The stores then redeemed the stamps with the Treasury Department. *See* Food Stamp Act of 1964, Pub. L. No. 88-525, § 4, 78 Stat. 703, 704 (1964).

Physical food stamps, however, are no longer used, and federal funds for the purchase of food items are now provided to qualifying households by Electronic Benefit Transfer or "EBT" cards. *See* 7 U.S.C. § 2016. When making a purchase at a retail food store, the SNAP beneficiary swipes the EBT card at the register and enters a four-digit personal identification code, essentially as if the beneficiary were making a purchase with a debit card. Pet. App. 51a. A third-party payment processor then transfers federal funds from the SNAP beneficiary's account to the retailer's account. Pet. App. 51a. Information on

these transactions and the federal funds disbursed is consolidated and stored on the Food and Nutrition Service's Store Tracking and Redemption System (the STARS database). Pet. App. 26a.

2. The Argus Leader is a newspaper published in South Dakota. Pet. App. 49a. It has been published since 1881 (originally as the Sioux Falls Argus), and today has the largest circulation of any newspaper in the State.

In 2011, an Argus Leader reporter submitted a FOIA request to the USDA. Pet. App. 61a. The request sought "data from the FNS STARS database" regarding the federal funds disbursed through SNAP. *See* C.A. App. 4. The information sought included the names and addresses of stores that received such federal funds, as well as the total amount of federal funds each store received each year from 2005 through 2010. Pet. App. 25a-26a. In response, the government provided some, but not all, of the information requested. Specifically, the USDA provided the names and addresses of the stores, but refused to provide the amounts of federal funds disbursed to particular stores under the SNAP program. Pet. App. 51a.

After the Argus Leader exhausted the internal agency appeals process, it filed a complaint in the U.S. District Court for the District of South Dakota in August 2011. Pet. App. 63a. The Argus Leader alleged that the USDA's refusal to provide the amounts of federal funds received annually by each retailer violated the FOIA. Pet. App. 24a. In response, the USDA argued that the FOIA's disclosure obligation

did not extend to the total amount of federal funds disbursed to particular stores.

3. In 2012, the district court granted the USDA's motion for summary judgment. Pet. App. 24a-45a. The court concluded that the information sought was exempted from the disclosure requirement under FOIA Exemption 3, which applies to information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The USDA argued that the information at issue was specifically exempted from disclosure under a statute that authorizes regulations that "require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, ... which will permit a determination to be made as to whether such applicant qualifies" to receive federal funds under SNAP. 7 U.S.C. § 2018(c). The statute imposes penalties on "[a]ny person who publishes, divulges, discloses, or makes known ... information obtained under" the section. *Id.* The district court acknowledged that the statute did not expressly exempt information about the amounts of SNAP funds received by retail stores, but concluded that such data nevertheless fell under the "broad umbrella" of "income and tax information." Pet. App. 41a.

4. Argus appealed and, in 2014, the Eighth Circuit reversed. Pet. App. 48a-57a. The court of appeals observed that § 2018(c) applies only to information "submit[ed]" by "an applicant retail food store or wholesale food concern." Pet. App. 54a. The information sought, however, was not obtained from the retail stores. Rather, the Eighth Circuit explained

that "[t]he [D]epartment [of Agriculture], not any retailer, generates the information, and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." Pet. App. 54a. The Eighth Circuit accordingly concluded that § 2018 did not shield the USDA's records of federal spending on SNAP from disclosure.

5. On remand, the USDA again moved for summary judgment, asserting this time that the requested federal spending data was shielded by FOIA Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and also by Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §§ 552(b)(4) & (6).

The district court denied the USDA's motion. Pet. App. 60a-70a. As to Exemption 4, the district court observed that, following the Eighth Circuit's decision, the USDA sought feedback from retailers about whether the federal SNAP spending data should be released. Pet. App. 64a. Only a tiny percentage of the retailers (less than 1%) responded to say that they opposed the release. Pet. App. 64a, 67a-68a. As a result, the district court found that "there is evidence that supports the inference that the majority of SNAP retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data." Pet. App. 68a. As to Exemption 6, the district court concluded that a reasonable fact-finder could conclude that the public interest in knowing the amount of federal subsidies various food

retailers receive outweighs any interest in personal privacy. Pet. App. 68a-69a.

The USDA then withdrew its Exemption 6 claim, and the case proceeded to a bench trial on the Exemption 4 claim alone. Pet. App. 10a-11a. At trial, several government employees testified regarding their practices in generating and compiling the pertinent SNAP data. Further, the USDA offered the testimony of several executives of grocery chains. The executives testified that information about the amount of SNAP spending at individual retail food stores is not public knowledge, and asserted generally that disclosure of that information might be helpful to competitors. Pet. App. 11a-12a. One also speculated that, if the data showed a large volume of sales at a given retailer, revealing that fact could cause "potential stigma" for the store. Pet. App. 11a. On cross-examination, the executives conceded that information about a particular grocery store's business, such as location, product selection, and pricing, was already available to the public. Pet. App. 11a-12a. They also acknowledged that the total amount of federal SNAP money a store receives provides only a limited window into the store's operations, and that the disclosure of such information would not be tantamount to disclosing a store's net profits or revenues. Pet. App. 11a-12a.

The Argus Leader presented the testimony of two experts. They testified that yearly amounts of federal SNAP money received by a store would be of little value to a competitor. Pet. App. 12a-13a. A variety of different factors may affect the aggregate amount of SNAP spending at a given retail food store, from the

price of goods, to an individual store's customer demographics, to an overall increase in the number of households qualifying for SNAP subsidies. Pet. App. 13a. As such, bare totals of SNAP spending at a particular retailer over the course of a year would not play a significant role in a competitor's business decisions. Pet. App. 13a.

Based on the evidence presented, the district court found that the USDA failed to meet its burden to show that the information sought was protected from the FOIA's disclosure obligation under Exemption 4. Pet. App. 9a-21a. As to whether the information should be considered "obtained from the government" rather than "obtained from a person" outside of the government, the district court concluded that the Eighth Circuit's prior decision already resolved that question against the Argus Leader. Pet. App. 15a-16a.

The district court next addressed whether the information sought was "confidential" within the meaning of Exemption 4. The court explained that the Eighth Circuit had adopted the interpretation of "confidential" commercial information first articulated by the D.C. Circuit in *National Parks*. Pet. App. 16a. Under that reading of the exemption, commercial or financial "[i]nformation is confidential" for purposes of Exemption 4 "if 'disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Pet. App. 16a (quoting *Contract Freighters, Inc. v.*

Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001)).

Because the USDA conceded that the first prong of the test was inapplicable, the court noted that the decision here turned on whether the USDA met its burden, under the second prong, of showing that disclosure was likely to cause substantial competitive harm. As to that issue, the district court found that there was actual competition in the relevant market. Indeed, the court determined that "[c]ompetition in the grocery business is fierce." Pet. App. 17a. But the court concluded that the USDA failed to show by a preponderance of the evidence that disclosure of the materials at issue was likely to cause substantial competitive harm. Reviewing the witness testimony, the court noted that a range of information about a retail food store's business is already publicly available, and that the federal SNAP spending data "would not add significant insights into the grocery industry." Pet. App. 19a. Accordingly, "any potential competitive harm from the release of the requested SNAP data is speculative at best." Pet. App. 19a.

After the district court held that the information sought is thus not exempt from disclosure under Exemption 4, the USDA informed the Argus Leader that it was abandoning its claim that the aggregate SNAP spending amounts were exempt from FOIA and that it would therefore disclose the information. Pet. App. 72a. At that time, the Food Marketing Institute (FMI), a trade association for food retailers, moved to intervene in the litigation in order to pursue an appeal of the district court's decision. The district court granted intervention under Federal Rule of

Civil Procedure 24(a). Pet. App. 71a-78a. The court concluded that FMI had standing because "its members would otherwise have standing to sue in their own right because of the potential nonconsensual dissemination of private information." Pet. App. 75a.

6. FMI appealed to the Eighth Circuit. The court of appeals affirmed. Pet. App. 1a-6a. The court found no clear error in the district court's determination that the USDA had not shown that the information sought qualified as "confidential" under Exemption 4. The court observed that the "record evidence showed that the contested data—which are nothing more than annual aggregations of SNAP redemptions—lacked the specificity needed to gain material insight into an individual store's financial health, profit margins, inventory, marketing strategies, sales trends, or market share." Pet. App. 4a-5a. The court further explained that "FMI's assumption that stores would be stigmatized" by the release of the data "was speculative and not supported by any other evidence in the record." Pet. App. 5a. Finally, in a footnote, the court rejected FMI's suggestion that "confidential" commercial or financial information should be construed to mean simply that the information "has previously been kept secret," observing that, under that interpretation of "confidential," "Exemption 4 would swallow FOIA nearly whole." Pet. App. 4a.

FMI petitioned the Eighth Circuit for rehearing en banc. It focused its argument on the contention that it should have won under a prior Eighth Circuit case also applying the likelihood-of-substantial-competitive-harm test. *See* Appellant's Petition for

Rehearing En Banc at 7-16, *Argus Leader Media v. Food Marketing Institute*, No. 17-1346 (8th Cir. July 21, 2018), Dkt. 4674655. FMI did not invite the en banc Eighth Circuit to abandon the test altogether. The court denied the petition. Pet. App. 85a-86a.

FMI moved the Eighth Circuit to stay the mandate pending a petition for certiorari. The court of appeals denied the motion. Pet. App. 79a-80a. FMI then applied to this Court to recall the mandate and stay it pending a petition for certiorari. This Court granted the application; Justices Ginsburg, Sotomayor, and Kagan indicated they would deny the application. Pet. App. 81a-82a.

REASONS TO DENY CERTIORARI

The petition should be denied for three main reasons. *First*, it implicates no disagreement among the courts of appeals. Petitioner alleges no conflict at all on its first question presented. On the contrary, Petitioner concedes that, in the more than four decades since the D.C. Circuit first articulated the *National Parks* interpretation of "confidential" commercial information under FOIA Exemption 4, every circuit to have addressed the question has adopted that interpretation, and no circuit has rejected it. That is the opposite of a circuit split.

Though Petitioner does assert a circuit split on its second question presented, no such split exists: Neither the court of appeals here, nor any other circuit, has ever held that a "party opposing disclosure" must "establish with near certainty a defined competitive harm like lost market share" to

show that commercial information is confidential under Exemption 4, as Petitioner claims. Moreover, this case does not implicate any of the supposed subsidiary "circuit splits" arising from the application of *National Parks* that Petitioner posits, and most of these do not represent real circuit splits anyway—just different outcomes deriving from applying the same standard to different facts.

Second, this case presents a singularly poor vehicle for considering the interpretation of "confidential" commercial or financial information under Exemption 4, because Exemption 4 applies only to information "obtained from a person" outside of the government, whereas this case involves information generated and compiled by the government, relating to the government's own spending on a federal program. Thus, even if the courts of appeals' agreement on the *National Parks* standard otherwise presented a basis for this Court's review, the highly atypical and inapt factual context of this case would not be a suitable vehicle.

Finally, certiorari is unwarranted in any event because the lower courts' long-established and uniformly accepted interpretation of a "confidential" business record is correct and consistent with basic principles of statutory interpretation. The alternative, subjective interpretation of "confidential" that Petitioner proposes, and that no court has adopted, would be overly broad, unworkable, and inconsistent with the structure and purposes of FOIA.

I. The Case Does Not Implicate Any Circuit Split.

A. The courts of appeals have uniformly embraced the *National Parks* interpretation of "confidential" commercial information.

Petitioner's principal argument is that this Court should grant certiorari to correct the court of appeals' "erroneous construction of 'confidential' [commercial or financial information] in FOIA Exemption 4." Pet. 10. Petitioner concedes, however, that every circuit that has addressed the issue has adopted the same construction, and none has rejected it. Indeed, by Petitioner's own account, "the Circuits have fallen in line behind" the interpretation of "confidential" commercial information first articulated by the D.C. Circuit in *National Parks*, with "[a]t least ten Circuits hav[ing] embraced the *National Parks* test and an eleventh [having] applied it in an unpublished decision." Pet. 14. Petitioner thus concedes that there is no circuit conflict—courts of appeals throughout the country apply the same standard, ultimately drawn from the same D.C. Circuit decision, to determine whether "commercial" information qualifies as "confidential" under FOIA Exemption 4.[1]

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[1] *See 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000); *Acumenics Research & Tech. v. U.S. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Cont'l Oil Co. v. Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir.

In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), the en banc D.C. Circuit was presented with the opportunity to jettison the interpretation of "confidential" commercial information "obtained from a person" that the court had adopted approximately two decades earlier in *National Parks*. Not one judge on that court ultimately thought the court should do so. The court highlighted "the widespread acceptance of *National Parks* by other circuits," noting that, at that time, "seven ha[d] adopted its test of confidentiality" and "none ha[d] rejected it." *Id.* at 876. The court further noted that Congress had done nothing that would call into question its interpretation of "confidential" commercial or financial information; on the contrary, "Congress has taken cognizance of the [*National Parks*] case in enacting subsequent legislation," and "accepted" the standard it articulated "as appropriate." *Id.* at 876-77 (internal citations omitted). Finally, the en banc court noted that the court's interpretation of "confidential" commercial or financial information had "not proven ... 'unworkable' in practice"; rather, decisions applying the standard simply showed, at worst, the inherent "difficulties that can arise whenever judicial lines are drawn." *Id.* at 877.

1975); *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984); *Contract Freighters, Inc.*, 260 F.3d at 861; *Pac. Architects & Eng'rs Inc. v. U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990); *Sharkey v. Food & Drug Admin.*, 250 F. App'x 284, 286 (11th Cir. 2007).

Two and a half decades have passed since *Critical Mass* and it remains the case that no circuit has rejected the *National Parks* approach. On the contrary, the number of circuits embracing the *National Parks* interpretation of "confidential" commercial or financial information has increased, so that now virtually every circuit has adopted it.[2] And this Court has repeatedly denied requests to review cases applying Exemption 4.[3]

Furthermore, although it has frequently amended FOIA over the years,[4] Congress has not amended Exemption 4 to reject the interpretation embraced by all of the circuits that have addressed the question. Shortly after the *National Parks* decision, a subcommittee of the House of Representatives held a

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[2] *See OSHA Data/CIH*, 220 F.3d at 162 & n.24; *Contract Freighters*, 260 F.3d at 861; *Sharkey*, 250 F. App'x at 286.

[3] *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, cert. denied, 507 U.S. 984 (1993) (No. 92-1043); *Clearing House Ass'n, L.L.C. v. Bloomberg L.P.*, cert. denied, 562 U.S. 1303 (2011) (No. 10-543); *Clearing House Ass'n, L.L.C. v. Fox News Networks, LLC*, cert. denied, 562 U.S. 1303 (2011) (No. 10-660); *N.H. Right to Life v. Dep't of Health & Human Servs.*, cert. denied, 136 S. Ct. 383 (2015) (No. 14-1273).

[4] *See, e.g.*, Privacy Act of 1974, Pub. L. No. 93–579, 88 Stat. 1896; Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (1976); Freedom of Information Reform Act of 1986, Pub. L. No. 99–570, §§ 1802, 1803, 100 Stat. 3207-48, 3207-49; Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; Intelligence Authorization Act for Fiscal Year 2003, Pub. L. 107–306, § 502, 116 Stat. 2383, 2405-07; OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2184; FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

hearing on requests for business records under FOIA. *See Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 95th Cong., 1st Sess. 2 (1977); *see also* Office of Information Policy, U.S. Dep't of Justice, FOIA Update, *Protecting Business Information* (Vol. IV, No. 4 Jan. 1, 1983) (noting that "subsequent wide acceptance and application of this *National Parks* test prompted congressional hearings"). The subcommittee ultimately released a report concluding that "[t]he rapid general acceptance of the substantial competitive harm test ... is strong evidence that the court in *National Parks* made a significant stride in dealing with the problems of confidential business information." House of Representatives Committee on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. No. 95-1382, at 20-21 (1978). The report rejected arguments in favor of a "'promise' or 'expectation' test of confidentiality"—the very approach Petitioner advocates here—concluding that this alternative approach was "not convincing" and was "generally inconsistent with the language of the fourth exemption as well as the policy underlying FOIA." *Id.* at 21. And the report likewise rejected a test based on "actual business policies for the release of information," concluding that such a test "w[ould] prove to be inadequate because of the widespread practice of withholding information whether or not there is a legitimate reason for the withholding." *Id.* at 18.

Finally, as explained in more detail below, the *National Parks* interpretation has proven workable.

Virtually all of the supposed subsidiary "circuit splits" that Petitioner claims have arisen in the application of the interpretation actually just represent different outcomes deriving from the application of the same legal standard to different factual circumstances. *See infra* at 17-25. Petitioner offers no reason to believe its proffered standard, or any other, would be any more workable. *See infra* at 29-35.

B. The claimed split is illusory.

While Petitioner concedes that the courts of appeals have uniformly embraced the *National Parks* approach, it argues that this case nevertheless implicates a conflict regarding how to apply the approach. Petitioner contends that, while some courts have held that a party may show that commercial information is "confidential" under FOIA's Exemption 4 by demonstrating that it "could be poter ially useful to a competitor," other circuits have he.' that "the party opposing disclosure" must "establish with near certainty a defined competitive harm like lost market share." Pet. i. Petitioner asserts that the Eighth Circuit here applied the latter standard, and that Petitioner would have won had the court applied the former standard.

The split Petitioner purports to identify does not in fact exist. The *National Parks* standard requires a "*likelihood* of substantial harm to the competitive positions of the parties from whom [the information] has been obtained." 498 F.2d at 771 (emphasis added). This means "the parties opposing disclosure need not show actual competitive harm; evidence revealing actual competition and the likelihood of substantial

competitive injury is sufficient to bring commercial information within the realm of confidentiality." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (internal citations omitted). The decisions Petitioner identifies as supposedly "disagree[ing]" on this issue all articulate that same standard. *See N.H. Right to Life*, 778 F.3d at 50; *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994).

Not surprisingly, given that they are all reading from the same *National Parks* playbook, none of the decisions Petitioner cites actually adopts either of the positions that Petitioner now presents as reflecting a "split" warranting this Court's review. None holds that the likelihood of substantial competitive harm can be shown simply by demonstrating that the information "could be potentially useful to a competitor." Pet. i. For instance, Petitioner suggests the Tenth Circuit adopted that standard in *Utah v. U.S. Department of Interior*, but nothing in the Tenth Circuit's decision supports that characterization. The court there held that the government had established a likelihood of substantial competitive harm where the government offered multiple affidavits indicating that the release of certain documents provided to the government by an Indian tribe would put the tribe "in a weaker position at the bargaining table in negotiating any future deals." 256 F.3d at 970; *see also id.* (noting affidavit "declar[ing] that disclosure of the withheld information would give ... competitors an unfair advantage 'in undercutting prices, structuring their transactions, and marketing'").

Likewise, none of the decisions Petitioner cites holds or even suggests that a "likelihood of substantial competitive injury" actually means a "near certainty" of "a defined competitive harm." Pet. i. On the contrary, the decisions that Petitioner references as "requir[ing] significantly more certainty and specificity," Pet. 26, actually emphasize that, to establish that materials are "confidential" under Exemption 4, a party need not "prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so," *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004), and that "the law does not require the [party resisting disclosure] to engage in a sophisticated economic analysis of the substantial competitive harm to its contractors that might result from disclosure," *GC Micro Corp.*, 33 F.3d at 1115.

Furthermore, nothing in the Eighth Circuit's decision here required a showing of a "defined competitive harm" with "near certainty." The court of appeals determined that the district court's decision was not clearly erroneous because the evidence showed, at best, that release of the information sought might make the "statistical models" used by competitors in the grocery business "marginally more accurate," but did "not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm." Pet. App. 5a (emphasis in original). Nothing distinguishes that analysis from that of all of the other circuits that have likewise adopted the *National Parks* interpretation of "confidential" commercial or financial information under Exemption 4.

Like most of the other supposed "circuit splits" to which Petitioner alludes, the purported split about "what constitutes a likelihood of substantial harm" is drawn from Justice Thomas's dissent from this Court's denial of certiorari in *N.H. Right to Life*, 136 S. Ct. 383, but relies on a misreading of that dissent. There, Justice Thomas, joined by Justice Scalia, stated that "courts' reliance on *National Parks* to determine whether information is 'confidential' commercial information has produced confusion." *Id.* at 384. Justice Thomas, however, did not say anything to suggest that this disagreement entailed some courts requiring a showing of a "near certainty" of a "defined competitive harm." And the only decision that Justice Thomas identified as departing from the requirement that a party show it would "likely suffer some defined competitive harm" is the First Circuit's decision in *N.H. Right to Life*, which Justice Thomas believed the Court should review.

The First Circuit's decision in *N.H. Right to Life* involved a distinctive set of circumstances. The materials sought there—Planned Parenthood's "Manual of Medical Standards and Guidelines," as well as information on its fee schedules and personnel practices—were provided in the context of a non-competitive application for a federal grant. 778 F.3d at 47, 51. The First Circuit nevertheless held that the Department of Health and Human Services had established that disclosure of those items was likely to cause substantial competitive harm, observing that, "[a]lthough Planned Parenthood admittedly did not compete for the federal grant in 2011, it certainly does face actual competitors—community health clinics—in a number of different arenas, and in future

Title X bids," and that "[a] potential future competitor could take advantage of the institutional knowledge contained in the Manual ... to compete with Planned Parenthood for patients, grants, or other funding." *Id.* at 51.

Whether or not *N.H. Right to Life* correctly applied the *National Parks* interpretation to the particular circumstances presented there, where the materials sought were provided to the government by a non-profit organization in a non-competitive bid for federal funding, the circumstances of the present case are quite different. The Eighth Circuit recognized "that the grocery industry is highly competitive," Pet. App. 5a, but Petitioner lost because the court found that disclosure of the information sought, which consists simply of total amounts of SNAP dollars received by a given retailer in a year, was not likely to cause substantial competitive harm. Pet. App. 5a. Justice Thomas's criticism of the First Circuit for allowing withholding even though the government couldn't show that disclosure was "likely to result in any negative consequences for the entity whose information was disclosed" provides no support for Petitioner's argument that, in the different setting of this case, the Eighth Circuit erred by applying an overly stringent standard for determining whether commercial information is "confidential" under Exemption 4.

C. This case does not implicate any of the other subsidiary circuit splits identified by Petitioner.

Petitioner lists four other "circuit splits" that it claims have arisen from the *National Parks* interpretation of "confidential" commercial information. Notably, petitioner does not even claim that *any* of these supposed "splits" is actually implicated by this case. For good reason. None of them is.

Two of the purported splits involve what a party must demonstrate to show "actual competition." Pet. 26-28. But, as noted, here the Eighth Circuit acknowledged that "the grocery industry is highly competitive," so the adverse ruling did not turn on the standard for showing "actual competition." Pet. App. 5a. The third supposed split involves "whether bad publicity or 'embarrassment' in the marketplace is the type of competitive harm against which Exemption 4 protects." Pet. 28. But the Eighth Circuit here determined that, even if potential embarrassment could be a basis for competitive harm, "FMI's assumption that stores would be stigmatized" by the disclosure of the aggregate amount of SNAP dollars they receive "was speculative and not supported by any other evidence in the record." Pet. App. 5a. So that issue, too, is not presented. The fourth purported split involves whether the likelihood-of-substantial-competitive-harm test applies only to information that the government requires to be provided, or applies also to information provided voluntarily. Pet. 28-29. That issue is not presented here because the district court found that the information at issue was

not supplied voluntarily, and no one disputed that finding on appeal. Pet. App. 16a. Because none of the ostensible subsidiary "circuit splits" is actually implicated here, this case offers no opportunity to address them.

Petitioner's apparent point, in listing these "splits" that this case in reality provides no opportunity to resolve, is to show that *National Parks* has generated "widespread confusion," which would be eliminated by abandoning altogether the Exemption 4 standard it embodies. Pet. 29. But digging into the decisions Petitioner identifies demonstrates just the opposite: Most of the decisions Petitioner describes as showing "circuit splits" reflect no such splits at all. Rather, they simply show courts applying the same test to different facts, resulting in different outcomes.

Take, for instance, the supposed split about "what kind of 'actual competition' must be shown." Pet. 26-27. The two decisions Petitioner cites as illustrating this split do not recognize any disagreement on the point. And Petitioner's characterization of the purported disagreement between these two decisions does not jibe with what they actually say. The decision that Petitioner identifies as articulating a *narrow* approach to defining the relevant market actually defined the relevant market rather broadly, as the entirety of the "United States import market." *Watkins v. U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011). Meanwhile, the decision that Petitioner identifies as taking an "expansive view of what the relevant market is" defined the relevant market in terms of

competition for patients, grants, and other funding in the medical field. *N.H. Right to Life*, 778 F.3d at 51.

Likewise, consider the supposed split about "whether 'actual competition' can be shown based on the possibility of competition from a hypothetical future competitor." Pet. 27. None of the decisions that Petitioner identifies as purportedly "account[ing] for hypothetical future competitors" rested entirely on the nature and existence of such competitors; all found that there was actual, current competition in the market for the services at issue. *See People for the Ethical Treatment of Animals v. United States Dep't of Health & Human Servs.*, 901 F.3d 343, 350 (D.C. Cir. 2018) (finding that the party resisting disclosure established competitive market for the importation of nonhuman primates); *N.H. Right to Life*, 778 F.3d at 51 (concluding that "Planned Parenthood faces plenty of competition from other entities for patients" because "[m]any of Planned Parenthood's services are also provided by hospitals and health clinics"); *Sharkey*, 250 F. App'x at 290 (party resisting disclosure faced both domestic and international competition in the market for vaccines). Petitioner does not identify any decision in which a court held that "actual competition" can be established on the basis of hypothetical future competitors alone.

Ultimately, Petitioner's discussion of ostensible "circuit splits" arising out of the *National Parks* interpretation establishes the opposite of what Petitioner hopes to show. The *National Parks* test has been around for more than four decades, has been adopted by nearly every circuit, and has been rejected by none. Yet in attempting to show the "widespread

confusion" it has supposedly generated, the best Petitioner can offer is a hodgepodge of a dozen or so decisions, most of which show no apparent disagreement at all. This state of affairs confirms, as the en banc D.C. Circuit found more than two and a half decades ago, that the *National Parks* test is sound and has in fact not proven unworkable in practice. *Critical Mass*, 975 F.2d at 877.

II. The Case Is A Poor Vehicle For Assessing *National Parks*.

Even if this Court were inclined to review the long-established interpretation of "confidential" commercial information under FOIA Exemption 4, which has been adopted by every circuit that has addressed the issue, this case would provide a singularly poor vehicle for doing so.

Exemption 4 applies only to confidential commercial information "obtained from a person." 5 U.S.C. § 552(b)(4). The exemption typically operates in circumstances where private parties provide documents with confidential commercial or financial information to the government. The exemption does not apply, however, to information generated by the government itself—a point that Petitioner concedes. Pet. 11; *see also Department of Justice Guide to the Freedom of Information Act* 271-72 (2009) ("The courts have held ... that information generated by the federal government itself is not 'obtained from a person' and is therefore excluded from Exemption 4's coverage.").

The information at issue fails to meet that threshold requirement—it was not obtained from Petitioner or its members. The Argus Leader seeks records generated and maintained by a federal agency, stored on a federal database, relating to the government's own spending under a federal program. Far from implicating Exemption 4, the information sought here is the classic type of government information that Congress sought to make available under FOIA, to help shed light on what the government itself is doing. "FOIA is often explained as a means for citizens to know what their Government is up to." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks omitted); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989) ("FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny."). And there can be little dispute that "the protection of the public fisc is a matter that is of interest to every citizen." *Brock v. Pierce Cty.*, 476 U.S. 253, 262 (1986).

That this case involves the government's own records about government spending makes this case an unsuitable vehicle for considering *National Parks*. To begin with, because the information in the records here is not "obtained from a person," 5 U.S.C. § 552(b)(4), there is a separate basis for holding that Exemption 4 does not apply. If this Court were to grant review, the Argus Leader would advance the not "obtained from a person" issue as a threshold, independent ground for affirming the judgment of the court of appeals. If this Court agreed, then it would not reach the questions about the proper

interpretation and application of the confidentiality requirement.[5]

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[5] In a footnote in the Eighth Circuit's decision, the court stated that "[t]he district court found that the contested data were obtained from a person, and neither party contests that finding on appeal." Pet. App. 2a. The threshold "from a person" issue has, however, been adequately raised and preserved for this Court's review. In the first appeal to the Eighth Circuit, the Argus Leader pressed the argument that it was simply seeking the government's own information, and not information obtained from retailers. Pet. App. 42a; Appellant's Brief at 10, *Argus Leader Media v. U.S. Dep't of Agric.*, No. 12-3765 (8th Cir. Jan. 16, 2013), Dkt. 3994956. The Eighth Circuit agreed that the information was not obtained from the retailers, but also found that "the underlying data is 'obtained' from third-party payment processors." Pet. App. 54a. On remand, again the Argus Leader argued that the information at issue was not "obtained from a person" under Exemption 4. Pet. App. 15a. ("Argus contends that the government is essentially keeping track of its own spending."). The district court rejected that argument based on the law-of-the-case doctrine, finding that the Eighth Circuit "held that the requested information is 'obtained' from third-party payment processors." Pet. App. 15a. Because the district court held that the Eighth Circuit's prior decision already resolved the issue, the Argus Leader in the second appeal before the Eighth Circuit did not reiterate its argument that the information sought was the government's own records of federal spending. That did not amount to a waiver, however. Waiver doctrine does not require a party to press arguments that are foreclosed by circuit precedent or law-of-the-case, much less to reiterate arguments that have already been rejected by the court of appeals in that very matter. *See U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). Furthermore, as the prevailing party before the district court, the Argus Leader was not required to raise every possible alternative ground for affirmance. *See, e.g., Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("We certainly agree that the failure of an appellee to have raised all possible alternative

Moreover, the fact that this case involves a request for the federal government's own records of spending means that Petitioner here does not have standing. For most of the life of this case, the defendant has been the U.S. Department of Agriculture, which actually creates and maintains the records sought. The USDA abandoned its Exemption 4 position after it lost at trial, at which point FMI intervened. FMI claimed to have associational standing, arguing its members "would ... have standing to sue in their own right because of the potential nonconsensual dissemination of private information." Pet. App. 75a. Because neither Petitioner nor its members can identify any of their own "private information" at issue here, however, they cannot establish "an invasion of a legally protected interest" necessary to establish their standing to litigate the matter. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (plaintiffs could not establish standing to challenge government surveillance where they could not demonstrate that their own communications would be imminently intercepted).

Even if the threshold issue could be avoided, the fact that the information sought here is the government's own information, and not information obtained from the retailers that are now objecting to its disclosure, makes this an atypical Exemption 4

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grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver.").

case, and thus a poor vehicle for assessing the lower courts' interpretation of the provision. Because the *National Parks* standard has been in place for more than four decades and has been adopted by every circuit that has addressed the issue, a substantial body of precedent has developed applying the approach to a wide range of possible materials. If this Court were to consider sweeping that body of law away and replacing it with a new test that no court to date has applied, it should do so in the context of a typical Exemption 4 case that would enable it to explicate and apply the new approach it announces. This is not such a case: It involves federal spending data on a government program, and the only information obtained from outside the government comes from third-party payment processors, not the retailers themselves that now object to its disclosure.

The present case, for all of these reasons, does not present a suitable vehicle for deciding what FOIA's exemption for confidential commercial information obtained from a person means.

III. The Decision Below Is Correct.

Review is also unwarranted because the court of appeals' determination that the information sought here is not "confidential," affirming the district court's findings made after a trial on the merits, is correct. The information sought is simply the aggregate amount of SNAP dollars spent at a given retailer over the course of the year. The court of appeals correctly concluded that such information "lack[s] the specificity needed to gain material insight into an individual store's financial health, profit margins,

inventory, marketing strategy, sales trends, or market share," and thus cannot be considered "confidential." Pet. App. 4a-5a.

Petitioner's core grievance with the *National Parks* interpretation of "confidential" commercial information is that it is, in its view, "atextual." Pet. 11. Petitioner would read the term "confidential" as demanding no inquiry into potential competitive harm resulting from disclosure of information the government obtained from a private person. Instead, Petitioner would replace the objective inquiry uniformly adopted by the courts of appeals with a subjective inquiry into whether the private party that was the source of the information "intended" it to be further disseminated. Pet. 18.

As an initial matter, that reading of Exemption 4 flouts this Court's repeated admonition that "FOIA exemptions are to be narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982). Petitioner's subjective test is hardly a narrow reading of the exemption. Indeed, it is about the broadest possible reading of the exemption. It would allow private parties to dictate the application of the exemption, "making the Government's disclosure policy contingent on the disclosure policy of the individual submitter." *9 to 5 Org. for Women Office Workers*, 721 F.2d at 7. But as Congress understood, "disclosure policy cannot be contingent on the subjective intent of those who submit information. For example, it clearly would be inappropriate to withhold all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests

for information." H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 18 (1978).

In contrast, the interpretation adopted by every circuit that has addressed the issue is an objective standard. That objective formulation is consistent with the way courts have approached the identification of "confidential" business or financial information in analogous contexts. For instance, though this Court has long recognized a general public right to inspect and copy judicial records, it has identified an exception for "business information," defined as information "that might harm a litigant's competitive standing." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Similarly, Federal Rule of Civil Procedure 26(c) allows a court to order the sealing of "commercial information," yet courts have repeatedly rejected the assertion that the rule "furnish[es] an absolute privilege against disclosure of material that a party might wish to mark confidential." *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011); *see also Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (objecting to litigants in commercial cases agreeing to seal discovery documents as well as pleadings and exhibits filed with the court). And the likelihood-of-substantial-competitive-harm analysis has been adopted in numerous federal regulations and state statutes for determining when business and financial information is considered confidential. *See, e.g.*, 40 C.F.R. § 2.208(e)(1); 40 C.F.R. § 710.37(c)(ii); Del. Code Ann. tit. 16, § 6308(f)(3); Fla. Stat. § 377.606; Iowa Admin. Code r.561-2.5 (2011); Miss. Code. § 25-11-121(11).

Moreover, a fundamental precept of statutory interpretation requires courts to construe statutory language in context. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("[C]ontext is a primary determinant of meaning."). Here, it is thus relevant that Exemption 4 also refers to "trade secrets," whose status has also long been held to turn on whether they give their possessor "an opportunity to obtain an advantage over competitors" or are "commercially valuable." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1286-87.[6]

In *U.S. Department of Justice v. Landano*, 508 U.S. 165 (1993), this Court construed "confidential" as that term is used in a different FOIA exception—Exemption 7, which protects "records [and] information compiled for law enforcement purposes" where disclosure "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C.

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[6] Petitioner is wrong to assert that the *National Parks* interpretation of "confidential" has "marr[ed] th[e] exemption's separate 'trade secrets' prong" by forcing the D.C. Circuit to reject the "broad common-law definition of trade secrets [that] was widely accepted in other areas of the law." Pet. 20. The D.C. Circuit did not identify a single common-law definition of "trade secrets," as Petitioner claims. Pet. 20. Rather, the court concluded that "the term 'trade secrets' has been defined both broadly and narrowly at common law." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1286. The court ultimately settled on the narrower of the two common-law definitions because it thought that the broader one, "tailored as it is to protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations," was "ill-suited for the public law context in which FOIA determinations must be made." *Id.* at 1289.

§ 552(b)(7). The Court explained that the proper reading of "confidential" was driven both by common usage and by the specific context in which the term is used in Exemption 7: "A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." 508 U.S. at 174. And in explicating how this definition should be applied, this Court discussed a variety of factors that courts should consider, such as whether the source is a "paid informant," the "nature of the crime[,] and the source's relation to it." *Id.* at 179.

The discussion of these factors in *Landano*—a decision Petitioner sees as a correct, textually-driven approach to the FOIA exemptions—demonstrates that this Court does not blindly interpret statutes based on bare dictionary definitions divorced from context. Rather, it considers the common usage of a term, informed by the statutory context in which the language appears. The same approach has been properly applied by the circuits in rejecting a subjective standard for the term "confidential" under Exemption 4, and in embracing an objective standard that assesses whether "commercial or financial information" qualifies as "confidential" in terms of the likely competitive harm resulting from its disclosure.

The application of Petitioner's proposed subjective standard for determining confidentiality would also raise a host of ambiguities. For instance, Petitioner asserts that the information at issue here would clearly be deemed exempt under its newly minted standard because the information is "not

publicly available and is carefully safeguarded by retailers." Pet. 24. But how can the government's own information about federal spending on a federal program be said to be "safeguarded by retailers" who did not generate the information in the first place?

Finally, Petitioner's proposed subjective standard would severely undermine the predictability of FOIA law. An objective approach to whether commercial information qualifies as "confidential" under Exemption 4 promotes consistency and predictability: Once a court determines whether the disclosure of a particular type of material is or is not likely to cause substantial competitive harm, that holding will apply to other materials of the same type. As a result, private parties that are asked or required to provide materials to the government can predict whether they will be subject to disclosure. And the objective approach also helps the government comply with its FOIA obligations, by allowing it to determine more readily and efficiently whether the information sought is subject to disclosure. Under Petitioner's contrary reading, however, even if a court had previously determined that a particular type of information is or is not subject to disclosure, that would not be dispositive regarding a subsequent FOIA request for materials of the same type—after all, the particular entity that provided the newly-sought information might have done so with a different subjective intent or expectation about whether the information would be disclosed; it might have a different internal disclosure policy; it might have taken different steps to "safeguard" the information.

In sum, the long-established and uniformly-accepted interpretation of "confidential" commercial information under Exemption 4 is consistent with both the statutory text and the underlying purposes of FOIA. In the more than forty years over which the interpretation has been applied, it has not proven unworkable. There is no reason to upend the decades of precedent that have developed from the application of that interpretation to adopt a new interpretation that no circuit has embraced, and that would likely prove highly unworkable in application.

CONCLUSION

The petition for a writ of certiorari should be denied.

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December 14, 2018

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition remains accurate.

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IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
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ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY FOR PETITIONER

The Brief in Opposition does not dispute how unmoored the *National Parks* test is from Exemption 4's text, and it ignores the numerous criticisms of that test marshaled by petitioner and *amici*. Nowhere does respondent contest the importance of the questions presented. Instead, it justifies denying certiorari on the basis that *National Parks* already reigns broadly across the country.

But *this Court* is the authoritative expositor of the meaning of federal law. Textual errors aside, *National Parks* has not generated clarity, either. Respondent denies the existence of the numerous circuit splits that petitioner, multiple *amici*, and Members of this Court have identified—but respondent fails to meaningfully examine the relevant cases. Respondent also raises, for the first time, the specter of a "vehicle" issue—one unsupported by the record, uncontested below, and insufficient in any case to justify denial of review. Rather, this case represents an ideal vehicle to restore an important statute's

plain meaning. The Court should grant review.

I. RESPONDENT BARELY TRIES TO SQUARE *NATIONAL PARKS* WITH FOIA'S PLAIN TEXT AND THIS COURT'S CASES

Perhaps recognizing the difficulty of contesting petitioner's argument that *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), is irreconcilable with Exemption 4's plain text,[1] respondent makes little effort to defend the test on that basis. It instead urges inertia: that this Court should defer to the D.C. Circuit because other lower courts have widely adopted *National Parks*. Of course, this Court owes no deference to any Circuit precedent, particularly one that was wrongly decided and that continues to generate serious confusion in application.

1. Respondent is right that many Circuits have reflexively adopted *National Parks*. BIO 13. But this Court grants certiorari to correct erroneous, although widespread, interpretations of important federal statutes. *E.g.*, *Milner* v. *Dep't of the Navy*, 562 U.S. 562, 581 (2011) (overturning a long-standing atextual test adopted by most Circuits for a plain-text interpretation of FOIA Exemption 2); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191, 196 (1994) (replacing long-standing and broadly-adopted lower-court interpretation of aiding-and-abetting liability in securities actions with a plain-text interpretation, and rejecting dissent's argument that the previously "settled construction * * * should not be disturbed").

Widespread adoption of a test does not make it correct. Respondent does not dispute that the Circuits have "fallen in line behind" the D.C. Circuit, BIO 13, rather than having embraced the test after careful examination

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[1] 5 U.S.C. § 552(b)(4).

of Exemption 4's text. In contrast, *National Parks* has met staunch criticism from jurists, including Members of this Court, and the Department of Justice. See Pet. 14-15; U.S. Br. in Opp'n 9, *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, No. 14-1273 (arguing that "confidential" in Exemption 4 should be given its ordinary meaning). And a majority of the Members of this Court granted petitioner's Application to Recall the Mandate in this case, confirming that these concerns are plausible. Pet. App. 81a-82a.

Respondent neither refutes these points nor explains why they do not justify this Court's review. It just ignores them.

2. Respondent attempts to bolster *National Parks* by suggesting that the D.C. Circuit unequivocally reaffirmed it. BIO 14 (discussing *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*)). In fact, the *en banc* D.C. Circuit retained its test based on *stare decisis*—not because it believed *National Parks* correctly interpreted FOIA Exemption 4. See *Critical Mass*, 975 F.2d at 877 ("Whatever our individual opinions as to the merits of the two-part test, we accept the wisdom of Justice Brandeis's observation * * * that *stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." (internal quotation omitted)).

Regardless, D.C. Circuit precedent poses no *stare decisis* obstacle for this Court. The opposite is true: "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Furthermore, as *amici* supporting petitioner demonstrated, *National Parks* is not even set-

tled—it has caused pernicious and unpredictable effects.[2] Whatever the D.C. Circuit may have thought a generation ago, experience has proven *National Parks* unworkable.

3. Respondent's reliance on legislative history is also misplaced. Respondent mistakenly suggests that Congress blessed the *National Parks* test in a 1978 Committee report. BIO 16.

The report came from a House of Representatives Committee—hardly both Houses of Congress after presentment to the President. Even if the report *were* authoritative, it still contradicts respondent's characterization. It did not bless *National Parks*, but expressly stated the opposite: that the committee was "not prepared at this time to consider the merits of the substantial comparative harm test." *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. No. 95-1382 at 22. Instead, the subcommittee that prepared the report "limited its review primarily to the procedures used by agencies and by courts in deciding cases involving business information under exemption 4," *id.* at 12, and the report noted that the underlying hearings did not "delve deeply into the scope of exemption 4," *id.* at 22. In all events, the opinion of a House committee regarding the meaning of statute enacted by a different Congress over a decade earlier is at best an unreliable tool of statutory interpretation.

4. Respondent's brief ends with piecemeal merits arguments that "confidential" in Exemption 4 should *not* bear its plain meaning. Such contentions make certiorari *more* important, not less. If this Court's clear directive

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[2] *E.g.*, National Association of Convenience Stores *Amicus* Br. 14-23; Alliance of Marine Mammal Parks & Aquariums *Amicus* Br. 11-19; Chamber of Commerce *Amicus* Br. 10-17.

that statutes mean what they say does not apply to this single provision of FOIA, *this Court* should be the one to say so. And if respondent's arguments are wrong, then widespread legal error should not evade this Court's review.

a. Respondent asserts that "confidential" should not be given its ordinary meaning because FOIA exemptions should be narrowly construed. BIO 30. This Court recently rejected a strikingly similar argument under the Fair Labor Standards Act. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018). The "narrow-construction principle relies on the flawed premise that the FLSA pursued its remedial purpose at all costs." *Ibid.* Instead, exemptions must be given a "fair reading," as they "are as much a part of FLSA's purpose" as its other provisions. *Ibid.*; see also *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." (internal quotation and modifications omitted)).

FOIA is no different: each exemption is part of the statute, and a plain-meaning interpretation "gives the exemption the [meaning] Congress intended." *Milner*, 562 U.S. at 572 (giving "personnel" in FOIA Exemption 2 its plain meaning); see also Pet. 22.[3] *National Parks*, moreover, does not give "confidential" a "narrow" reading. Instead, it replaces that term with an atextual test fabricated using an especially objectionable form of legislative history: selective excerpts of witness testimony during hearings on a predecessor bill. Pet. 12-14; see *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986) (declining

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[3] As the Retail Litigation Center explains, the narrow-construction canon has a dubious provenance. Retail Litigation Center *Amicus* Br. 5-16.

to accord any significance to comments not made by a Member of Congress and not included in the official Senate and House Reports).

b. Respondent next protests that giving "confidential" its plain meaning would generate a subjective rather than objective test.[4] But parties would have to make the objective and verifiable showing that, for example, the information at issue was *in fact* considered and kept secret rather than publicly disseminated. Cases would turn on whether the record reflects satisfaction of an objective, matter-of-law standard defining "confidential," and the courts would always be the final arbiters of whether the agency or submitters met that standard.

Respondent unsuccessfully tries to turn *United States Department of Justice* v. *Landano*, 508 U.S. 165 (1993), to its advantage on this point. BIO 33. In *Landano*, this Court held that "confidential" in FOIA Exemption 7—which protects records that could reasonably be expected to disclose the identity of a confidential law-enforcement source—should be given its plain meaning. 508 U.S. at 174. The Court identified factors that could support inferring a source's confidentiality, such as how law enforcement communicated with the source. *Id.* at 179. *Landano* did not thereby repudiate the ordinary meaning of "confidential," but merely recognized that circumstantial evidence (examples of which it provided) may sometimes establish *whether* something is "confi-

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[4] Respondent claims "confidential" has been given an objective meaning in "analogous contexts." BIO 31. It cites cases about rules that govern whether the parties showed the requisite "good cause" to seal confidential documents in a judicial proceeding—not whether those documents were confidential in the first place. Respondent also cites regulations and state statutes that *expressly adopted* the "likelihood-of-substantial-competitive-harm" standard—unlike Exemption 4, whose text protects "confidential" information.

dential." *Landano* also expressly *rejected* a definition of "confidential" that "relie[d] extensively on legislative history" rather than on the statute's plain text, *id.* at 178—underscoring the impropriety of *National Parks'* legislative-history-driven rewriting of Exemption 4.

II. THE CIRCUIT SPLITS REGARDING APPLICATION OF *NATIONAL PARKS* ARE REAL AND THIS CASE CAN ELIMINATE THEM

1. Respondent vastly downplays the circuit splits that *National Parks* has spawned. It claims none exist because the Circuits all "articulate that same [*National Parks*] standard." BIO 18. As Justice Thomas recognized in his dissent from denial of certiorari in *New Hampshire Right to Life* v. *Department of Health and Human Services*, the Circuits may have nominally adopted the same standard, but its application has produced numerous splits. 136 S. Ct. 383, 384-385 (2015). Allegiance to a common "standard" or a shared magic-words formula is empty absent uniform implementation.

To satisfy *National Parks*, the D.C. and Ninth Circuits require "evidence that the entity whose information is being disclosed would likely suffer some defined competitive harm (like lost market share) if competitors used the information"; but the First and Tenth Circuits find the test met even if disclosure "would not likely result in any negative consequences for the entity whose information was disclosed." *Id.* at 384 (discussing *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015); *McDonnell Douglas Corp.* v. *Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *GC Micro Corp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994)); Pet. 26 (discussing *State of Utah* v. *U.S. Dep't of the Interior*, 256 F.3d 967, 970 (10th Cir. 2001)).

Respondent denies that the D.C. and Ninth Circuits demand "more certainty and specificity" than other Cir-

cuits—by noting that their opinions faithfully recite the *National Parks* standard. BIO 19. Again, parroting the same general standard cannot foreclose a circuit split on what satisfies the standard. The *McDonnell* and *GC Micro* courts demanded the submitter provide extensive, detailed, and industry-specific evidence regarding how each individual item of requested information would affect the submitter if used by a particular competitor. *McDonnell*, 375 F.3d at 1187-1193; *GC Micro*, 33 F.3d at 1113-1115. In contrast—and as respondent admits, BIO 18, 21-22—the Tenth Circuit deemed the *National Parks* test satisfied merely with affidavits stating generally that disclosure would provide competitors with a negotiating "advantage," and the First Circuit required only a showing that *future unidentified* competitors *might* use the information to compete against the submitter in some way. *State of Utah*, 256 F.3d at 970; *N.H. Right to Life*, 778 F.3d at 51.

Respondent contends that the First Circuit's approach does not represent a split because the *facts* there differed from the facts here. *National Parks*, like Exemption 4, does not define "confidential" differently based on the submitter's industry. Because these cases establish a split that was outcome-determinative below, certiorari is also warranted on petitioner's second question presented.[5]

2. Respondent does *not* contest several additional splits that petitioner[6] and *amici*[7] identified. Instead, it

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[5] Respondent's test for "splits" would shrivel much of this Court's docket—virtually no First Amendment case could be part of a "split," for example, because all courts quote the same First Amendment text and facts vary widely among cases.

[6] Respondent does not dispute the circuit split regarding "whether bad publicity or 'embarrassment' in the marketplace is a type of competitive harm against which Exemption 4 protects," Pet. 28, but

dismisses them as irrelevant, asserting that this case does not directly implicate *all* of them. BIO 22. But as petitioner explained, the circuit splits will all evaporate if the Court gives Exemption 4 its plain meaning, and at least some can be addressed if it does not. Pet. 11-12.

3. Finally, respondent justifies preserving *National Parks* because it supposedly produces predictable outcomes. BIO 34. The premise of predictability fails, and respondent provides no authority or examples to support it. Nor could it. As the DOJ FOIA Guide—cited by both parties—reveals, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines," and consequently have rendered "conflicting decisions" over whether Exemption 4 protects particular types of information.[8]

III. THERE IS NO VEHICLE PROBLEM

Respondent belatedly attempts to inject a nonexistent vehicle issue, arguing that the requested SNAP redemption data was not "obtained from a person." BIO 25-29. This tardy contention is meritless, waived, and presents no barrier to this Court's review.

1. Respondent's vehicle argument is meritless. Re-

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simply disagrees with Justice Thomas's description in his *New Hampshire Right to Life* dissent. See BIO 23-24. Respondent's challenge to the other split—whether a different test applies when information is *voluntarily* provided to the government, Pet. 28-29—misstates petitioner's argument. See BIO 24 (incorrectly characterizing petitioner as having argued that some decisions below "rested entirely" on the presence of hypothetical competitors).

[7] *E.g.*, Alliance of Marine Mammal Parks & Aquariums *Amicus* Br. 5-11 (identifying additional split); Chamber of Commerce *Amicus* Br. 5-9 (identifying two additional splits).

[8] U.S. Dep't of Justice Guide to the Freedom of Information Act at 309 (2009) https://www.justice.gov/oip/foia_guide09/exemption4.pdf (collecting cases); see also Pet. 25 & n.18.

spondent seeks "the yearly redemption amounts, or EBT [Electronic Benefits Transfer] *sales figures, for each store*" that participates in SNAP. Appellant's CA8 Br. App. 4 (emphasis added). The requested data represents actual sales information *from retail stores*—not a record of federal spending. It is created when customers swipe their EBT cards at a store and an EBT processor approves the transaction and pays the retailer. Trial Reporter's Record Vol. 1 at 15-21. The EBT processor sends the government daily SNAP-redemption totals for every retail location. *Id.* at 18.

The government does not generate the data, but only *receives* it. That the agency then stores, summarizes, or reformulates the information does not transform it into government information for purposes of Exemption 4. See, *e.g.*, *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 162 (3d Cir. 2000) (figures calculated *from information supplied by persons* are "obtained from a person"). Respondent's argument to the contrary—that it merely seeks "records generated * * * by a federal agency"—is both dangerous (it would allow *any* private information to escape the exemption if the government simply processes it) and unsupported by any record citation. See BIO 25-29. Because this is not a "request for the federal government's own records," BIO 28, respondent's associated standing argument also fails.

2. Respondent has also waived this argument, as the Eighth Circuit made crystal clear without objection: "The district court found that the contested data were obtained from a person, and neither party contests that finding on appeal." Pet. App. 2a n.2. The Eighth Circuit correctly recognized that respondent did not raise this argument on appeal; it is waived and too late to raise it

now.[9] Even if the Court concludes that the question is not waived,[10] it would at most be a matter for application on remand, not an obstacle to this Court's review of the governing legal questions presented. Cf. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) (declining to address additional question presented where "[n]o court has addressed that question, and we ordinarily await thorough lower court opinions to guide our analysis of the merits." (internal quotation omitted)).

CONCLUSION

The Court should grant the petition.

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[9] Contrary to respondent's contention, this issue was not foreclosed by "law of the case" after the first appeal to the Eighth Circuit. BIO 27 n.5. The first appeal concerned Exemption 3, not Exemption 4. Pet. App. 53a. On remand, and following a full merits trial, the district court ordered briefing on the "obtained from a person" issue. Neither party claimed this issue had been resolved in the prior appeal. *Argus Leader Media* v. *U.S. Dep't of Agric.*, Case No. 4:11-cv-04121-KES (D.S.D.), Docs. 121 (USDA Post-Trial Brief) & 124 (Argus Leader Post-Trial Brief). And the district court concluded—"[b]ased on the Eighth Circuit's ruling *and* the testimony at trial"—that this Exemption 4 prong was met. Pet. App. 16a (emphasis added). Respondent elected not to contest this finding before the Eighth Circuit, Pet. App. 2a n.2, and cannot change its mind now.

[10] Respondent's own cases recognize an issue must be raised before the Circuit to be preserved, even if that argument is foreclosed by Circuit precedent. BIO 27 n.5 (citing *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007)).

Respectfully submitted.

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No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, ANIMAL AGRICULTURE ALLIANCE, FUR INFORMATION COUNCIL OF AMERICA, INSTITUTE FOR MARINE MAMMAL STUDIES, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, PROTECT THE HARVEST, UNITED STATES ASSOCIATION OF REPTILE KEEPERS AND ZOOLOGICAL ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the Court restore the word "confidential" in Exemption 4 of the Freedom Information Act, 5 U.S.C. § 552(b)(4), to its plain meaning, or should it affirm the atextual meanings provided to it by the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983)?

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INTEREST OF *AMICI CURIAE*[1]

Amici are national associations and organizations whose members and stakeholders work with and care for animals in their respective vocations, businesses, industries and fields. As such, *amici* and their members and stakeholders regularly provide information, on both a required and a voluntary basis, to various federal agencies that regulate animal and wildlife use, care and maintenance. This case is important to *amici* because they and their members have been, and will continue to be, subjected to negative financial and reputational consequences as a result of the government's release of their confidential information due to the D.C. Circuit's atextual interpretation of the word "confidential" in Exemption 4 of the Freedom of Information Act, which courts around the country have adopted.

The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums, and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine mammal conservation through public display, education,

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1. Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild.

The Animal Agriculture Alliance is a 501(c)(3) industry-united nonprofit organization that connects food industry stakeholders; engages with food chain influencers; promotes consumer choice by helping people better understand modern animal agriculture; and protects the future of animal agriculture. Its members include farmers, ranchers, food companies, feed and animal nutrition companies, veterinarians, animal scientists, agricultural associations and other allied stakeholders.

The Fur Information Council of America ("FICA") is a not-for-profit organization that protects and promotes the interests of the U.S. fur industry. While its more than 100 members include some of the nation's largest fur retailers, manufacturers, wholesalers, fashion designers, auction houses, and other U.S. exporters of furbearing skins and products, approximately 85% of FICA's members are small, family-run businesses. FICA provides the public with information on the fur industry, wildlife conservation and responsible animal care to which the fur industry is committed. Part of FICA's mission is to protect the interests of the U.S. fur industry by providing its membership with support to counter distortions and misrepresentations made by anti-animal use groups.

The Institute for Marine Mammal Studies ("IMMS") is a 501(c)(3) nonprofit organization established in 1984 for the purposes of public education, conservation, and research on marine mammals in the wild and under human care. Located in Gulfport, Mississippi, IMMS has been an active participant of the Department of Commerce's National Oceanic and Atmospheric Administration's

National Stranding Network for decades, with the capability and expertise to care for sick and injured marine mammals and sea turtles. Through its programs for conservation, education and research, IMMS serves as a marine mammal educational outlet for the Mississippi Gulf Coast.

The National Association for Biomedical Research ("NABR") is a 501(c)(6) nonprofit association dedicated to sound public policy for the humane use of animals in biomedical research, education and testing. NABR has 330 member organizations, including pharmaceutical companies, biotechnology companies, universities, medical schools, and other life science organizations engaged in or having a stake in humane animal research.

Protect the Harvest is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

The United States Association of Reptile Keepers ("USARK") is a registered 501(c)(6) nonprofit membership organization representing reptile breeders, hobbyists, conservationists, academics, pet owners, scientists, and businesses that provide the reptile community with equipment, feed, transportation, and specialized veterinary and other services. USARK is an education, conservation and advocacy organization for herpetofauna promoting awareness, responsible care, and professional unity for all manners of reptile species. As part of this mission, the organization supports responsible private ownership of, and trade in, reptiles and amphibians, as well as promulgates and endorses responsible caging standards, sound husbandry, escape prevention protocols, and an integrated approach to vital conservation issues.

The Zoological Association of America ("ZAA") has more than 60 accredited members, with accreditation predicated on the promotion of the highest standards of animal welfare as well as public and staff safety. ZAA's work includes animal ambassador programs, classroom education and, with wildlife management professionals around the globe, the conduct and support of research in behavioral sciences and genetics and the exchange of information and training on husbandry, nutrition, best management practices and veterinary care.

SUMMARY OF THE ARGUMENT

The word "confidential," as used in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), to exempt confidential information from disclosure, is not defined. It need not be, as "confidential information" has a plain, unambiguous meaning: "Knowledge or facts not in the public domain but known to some . . . ." Black's Law Dictionary 361 (10th Ed. 2014).

Nonetheless, in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the D.C. Circuit created a test out of whole cloth to determine what is protected "confidential" information, viz., whether release of the information would likely cause substantial competitive injury. In *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983), the D.C. Circuit further minimized the plain reading of the term by imposing further atextual limitations.

Under *Public Citizen*, information is not considered "confidential" for Exemption 4 purposes if the disclosure of the information would cause reputational harm – even

if economic harm would flow from that reputational harm. Also under *Public Citizen*, information is only considered "confidential" if the party requesting it through FOIA is a direct competitor of the entity who submitted the confidential information to the government. These requirements have no basis in the text of the statute, or in its legislative history. Instead, they are based solely on two citation-free sentences in a law review article published in the University of Wisconsin Law Review in 1981. *Public Citizen*, 704 F.2d at 1291 n. 30.

Notwithstanding its dubious origins, *Public Citizen*'s law-review inspired precedent has been accepted by courts throughout the country, including the district court below. *Argus Leader Media v. U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (quoting *Public Citizen*, 704 F.2d 1291 n. 30). This widespread adoption wrongfully has failed to protect many persons whose confidential information is requested and then released through FOIA, including *amici*.

The lower courts' (mis)reading and misapplication of the term "confidential" as framed by the *National Parks and Public Citizen's* tests is both atextual and inequitable. This Court should return the word to its plain meaning.

ARGUMENT

I. THE D.C. CIRCUIT'S "CONFIDENTIAL" TEST FOR EXEMPTION 4 IS FUNDAMENTALLY FLAWED

In its Petition for a Writ of Certiorari, Petitioner Food Marketing Institute ("Petitioner" or "FMI") makes a compelling case why the D.C. Circuit's atextual

construction of the word "confidential" in the Freedom of Information Act ("FOIA")'s Exemption 4, 5 U.S.C. § 552(b)(4), should be reviewed and ultimately overruled by this Court. Having been targets of FOIA requests for information that a plain-language reading of Exemption 4 should have served to exempt from disclosure, *amici* urge the Court to grant FMI's Petition.

Petitioner correctly identifies *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) as the source of the D.C. Circuit's atextual "confidential" test. *Amici* have been particularly harmed by a later refinement of that test by the D.C. Circuit in *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983), which further distanced the D.C. Circuit and other courts that adopted the D.C. Circuit's test from the plain meaning of "confidential."

In a footnote that has since taken on a life of its own, the D.C. Circuit in *Public Citizen*

> emphasize[d] that "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."

704 F.2d at 1291 n. 30 (emphasis in original) (quoting Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wis. L. Rev. 207, 235-36 (hereinafter, "*Secrets and Smokescreens*")). Grounded only on the conjecture of the article's author for this "important point for competitive harm in the FOIA context" which *Public Citizen* embraced without any reference to case law, legislative history or analysis, *Secrets and Smokescreens* effectively established two new requirements for information to qualify as "confidential" under Exemption 4.

First, *Secrets and Smokescreens* posited that for information to be "confidential" under Exemption 4, the harm must "flow[] from the affirmative use of [the] proprietary information by *competitors*." *Secrets and Smokescreens*, 235 (emphasis in original) (citing nothing). Second, the article summarily concluded that reputational harm of the party whose information would be disclosed does not count in the Exemption 4 "confidential" analysis, stating that competitive harm cannot "flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Secrets and Smokescreens*, 235 (citing nothing).[2]

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2. As to *Secrets and Smokescreens*' unilateral exclusion of reputational harm from the Exemption 4 analysis, one critic has noted: "The author cites no cases or authority for this statement, nor does he provide any data or reference to social-science research on reputational effects. There is no other context given to his assertion of what competitive harm does or does not include. And yet it is this quote to which the D.C. Circuit [in *Public Citizen*] refers two years later in what has become a widely-cited – if purely dicta – comment regarding reputational harm." Kathleen Vermazen Radez, *The Freedom of Information Act Exemption 4:*

Nothing in the legislative history of FOIA – even in the attenuated legislative history relied on by the *National Parks* court – required or implied that the limitations imposed by the author of *Secrets and Smokescreens* should be applied to Exemption 4.[3] Yet, *Public Citizen*, depending on nothing other than *Secrets and Smokescreens*, imposed those restrictions. *National Parks* at least purported to rely on legislative history in expanding the statutory language. *See* Petition, pp. 12-13. *Public Citizen* did no such thing. Instead, in *Public Citizen* the D.C. Circuit radically expanded its already atextual definition of "confidential" based on a single academic's assumptions.[4]

Protecting Corporate Reputation in the Post-Crash Regulatory Environment, 2010 Colum. Bus. L. Rev. 632, 658 (2010) (citations omitted).

3. Indeed, "[b]oth the House and Senate reports on the FOIA bills provide that [Exemption 4] is intended to protect information which customarily would not be released to the public by the person from whom it was maintained. It seems clear that Congress intended Exemption 4 to maintain the status quo: business information which industry customarily held in confidence would continue to be exempt from mandatory disclosure under FOIA." Thomas L. Patten and Kenneth W. Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 197 (1977) (hereinafter, "Patten and Weinstein") (citations to House and Senate Reports omitted).

4. *Amici* recognize that members of the Court have expressed differences of opinion as to the utility of legislative history in the subsequent interpretation of a statute. *Compare Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (J. Sotomayor, concurring) (2018) ("Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law."), *with id.* at 783-84 (J. Thomas, concurring in part and in the judgment) ("I join the Court's opinion only to the extent it relies on the text of the Dodd–Frank Wall Street Reform and

Since *Public Citizen*, aside from courts within the D.C. Circuit, courts outside the Circuit also have applied the "law" of *Secrets and Smokescreens* without second thought.[5] For example, in *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189 (9th Cir. 2011), the Ninth Circuit took *Secrets and Smokescreens*, quoted without reservation by *Public Citizen*, as settled law. *See* 643 F.3d at 1195 ("Competitive harm analysis 'is . . . limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position . . . .'") (quoting *Public Citizen*, 704 F.2d 1280, 1291 n. 30).

Similarly, the district court in *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009), which was affirmed by the Second Circuit, 601 F.3d 143 (2d Cir. 2010), concluded that Exemption 4 did not apply because "the specific evidence must show that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace

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Consumer Protection Act . . . I am unable to join the portions of the Court's opinion that venture beyond the statutory text."). In this case, where both the statute itself and its legislative history were ignored in the D.C. Circuit's interpretation of Exemption 4, all of the Court's members should be comfortable overruling *Public Citizen*'s law-review inspired precedent.

5. *See, e.g., 100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 138 (D.D.C. 2017) (applying *Secrets and Smokescreens* test); *Edelman v. U.S. Sec. & Exch. Comm'n*, No. 315CV02750BENBGS, 2017 WL 4286939, at *6 (S.D. Cal. Sept. 27, 2017) (same); *AIDS Healthcare Found. v. U.S. Food & Drug Admin.*, No. CV1107925MMMJEMX, 2014 WL 10983763, at *6 (C.D. Cal. Feb. 13, 2014) (same).

or 'embarrassing publicity attendant upon public revelations.'" *Id.* at 279 (quoting *Public Citizen*, 704 F.2d at 1291 n. 30). And, relying on *Public Citizen*, the Seventh Circuit expounded that "the competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers exemption 4." *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).[6]

In fact, the district court in *this* case relied on the definition of "competitive harm" invented by *Secrets and Smokescreens*. The district court held, as a matter of law: "Competitive harm is limited to 'harm flowing from the use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations.'" *Argus Leader Media v. U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (quoting *Public Citizen*, 704 F.2d 1291 n. 30).

"It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quotation omitted). It should go without saying that the pronouncement of an academic in a law-review article

6. *But see Nadler v. F.D.I.C.*., 92 F.3d 93, 97 (2d Cir. 1996) (finding that "[s]ensitive financial information" falls within the class of materials that should be viewed as confidential and noting that "[t]he fact that this harm would result from active hindrance by the Plaintiffs rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four.").

should not be enough to modify the fundamental canons of statutory construction. Unfortunately, in the case of Exemption 4, a single University of Wisconsin Law Review article has managed to trump the statutory language and skew the fundamental canons of statutory construction.

Exemption 4 has evaded this Court's review for far too long. As Petitioner has explained, and as *amici* further demonstrate, it is past time for this Court to remedy the lower courts' errors, to revive the statutory language of Exemption 4, and to discard the convoluted and contradictory tests developed by the Circuit Courts in response to the D.C. Circuit's opinions in *National Parks* and *Public Citizen*. The historically suspect and practically harmful precedent of the D.C. Circuit should be relegated to the annals of history, and to the legacy of a time when statutory construction was more fluid and less attached to the text than today.[7]

II. *AMICI*'S DETRACTORS USE THE ARTIFICIAL STANDARDS CREATED BY THE D.C. CIRCUIT'S "CONFIDENTIAL" TEST TO HARM *AMICI*, THEIR MEMBERS AND SIMILARLY SITUATED ENTITIES

The D.C. Circuit's neutering of FOIA's Exemption 4 in *National Parks* and *Public Citizen* has not been

7. FOIA Exemptions 6 and 7 protect against the release of information that could cause a non-governmental party reputational harm. This Court has ruled that those exemptions do not apply to corporations. *FCC v. AT & T Inc.*, 562 U.S. 397 (2011). The Court should not allow a law review article to write out reputational harm from Exemption 4, which "clearly applies to corporations." *Id.* at 408-09.

without consequences. Indeed, the evisceration of the plain language of Exemption 4 has caused *amici* and similarly situated entities to have their confidential commercial information released under FOIA to their economic and reputational detriment.

In *Jurewicz v. U.S. Department of Agriculture*, 741 F.3d 1326 (D.C. Cir. 2014), the D.C. Circuit, adhering to its precedent originating in *National Parks* and *Public Citizen*, allowed confidential information of private entities similarly situated to *amici* to be released to the Humane Society of the United States ("HSUS"). In that case, "dog breeders and dealers in Missouri challenge[d] the Department of Agriculture's decision to release information in their annual reports relating to their gross revenue and business volume." *Id.* at 1329. This information clearly was confidential financial information of a non-governmental entity, and would squarely have been covered by a plain language reading of Exemption 4.

Nevertheless, finding that it was "bound by the law of the circuit," the D.C. Circuit in *Jurewicz* summarily rejected appellants' Exemption 4 challenge to the release of their confidential information, disregarding appellants' argument that "the Humane Society's intended use" of the FOIA'd information was "'to destroy [appellants'] businesses.'" *Id.* at 1331 (quoting Appellants' Br. 53). *Amici*, who face the same sorts of opponents as the *Jurewicz* appellants, have been and will continue to be similarly harmed unless this Court steps in.

More specifically, detractors of *amici* – including organizations such as People for the Ethical Treatment of Animals ("PETA"), HSUS and like-minded groups –

are not direct competitors of *amici*, in that they do not operate similar businesses. But, among their primary goals is to harm the interests of *amici* by, among other tactics, promoting negative campaigns and publicity against them and their members on social media, and, in certain instances, by harassing them and attempting to put them out of business. *Amici*'s detractors receive under FOIA confidential documents and information from the government that the government, in turn, obtained from *amici* and their members. Those opposition groups then use the confidential materials and information in their campaigns against *amici* and their members.

Under a plain language reading of Exemption 4, such confidential commercial or financial information would not be released. Yet, because *amici*'s detractors are not *amici*'s "direct competitors," and because the harm the activists intend to cause is, more often than not, reputational in nature (with adverse economic repercussions stemming from the reputational harm), the D.C. Circuit's interpretation of Exemption 4 improperly allows the publication and dissemination of *amici* and their members' confidential and proprietary information.

One *amicus*, the National Association for Biomedical Research, compiled an analysis of FOIA requests submitted to the U.S. Department of Agriculture's Animal and Plant Inspection Service ("APHIS") in 2015. That analysis found that, in 2015, APHIS received 889 requests for information under FOIA. "Approximately 30 percent (265) of the FOIA requests, which is a 23% increase from [2014], could be identified as submitted by animal rights/animal interest organizations, or individuals that appeared to be associated with such groups." *FY 15:*

Animal Rights FOIA Requests, National Association for Biomedical Research (May 19, 2016), https://www.nabr.org/wp-content/uploads/2016/05/FY2015-FOIA-Report-Final.pdf (the "NABR Report"), p. 2.[8] The NABR Report found that the information "most frequently requested" by the animal rights groups was "about exhibitors, actions related to horses and wildlife, dealers and research facilities." *Id.*

The NABR Report also found that approximately 10% (128) of the 1,273 FOIA requests received by the National Institutes of Health in 2015 came from animal rights/animal interest organizations. *Id.* at p. 5. "Almost all of the 123 requests filed by animal rights groups sought information related to research and research organizations." *Id.* at p. 6.[9]

A plain reading of FOIA's Exemption 4 would protect this information from being disseminated where it is commercial or financial in nature and confidential. Nonetheless, *National Parks* and *Public Citizen* have gutted the plain reading of Exemption 4, as detractors of *amici* explicitly rely on the tests enunciated in those cases in order to thwart a correct application of Exemption 4. *See, e.g., Jurewicz, supra*; *In Defense of Animals v. U.S. Dept. of Agriculture*, 656 F. Supp. 2d 68, 80 (D.D.C. 2009) (animal rights activist group allowed to obtain commercial confidential information, rejecting application of Exemption 4 because "the competitive harm that matters is a competitor's affirmative use of proprietary

8. The estimated cost to APHIS of handling the FOIA requests it received in 2015 was $1,836,896.28. NABR Report, p. 4.

9. The estimated cost to the NIH of handling its FOIA requests in 2015 was $3,621,518.15. NABR Report, p. 6.

information that could reap a commercial windfall for the competitor, rather than the harm caused by a customer or other third party's negative reaction to disclosure"); *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. 16-cv-00720 (D.D.C. filed Apr. 18, 2016), Humane Society International Motion for Summary Judgment, ECF No. 36 (filed June 22, 2018) pp. 28-29 ("[T]he majority of submitter declarants also argue that they would face competitive harm if their data were released, because animal protection organizations would harass them or otherwise interfere with their business. But this type of argument is entirely outside the realm of what Exemption 4 concerns." (Footnote omitted) (collecting cases)).

Once activists obtain through FOIA confidential commercial or financial information submitted to the government, they use it to the submitter's detriment. One case in point is demonstrated by the testimony presented earlier this year by Dr. Rae Stone, who testified on behalf of *amicus* AMMPA before the Senate Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard. *See Enhancing the Marine Mammal Protection Act: Before the Subcomm. on Oceans, Atmosphere, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation*, 115th Cong., p. 6 (April 25, 2018) (statement of Rae Stone, President & Partner, Dolphin Quest), https://www.commerce.senate.gov/public/index.cfm/2018/4/enhancing-the-marine-mammal-protection-act ("Stone Testimony"). Dr. Stone testified about confidential information required to be submitted by AMMPA members to the National Marine Fisheries Service ("NMFS") for its marine mammal inventory maintained pursuant to the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361, *et seq.*

The MMPA requires that NMFS maintain in the inventory, among other things, "[t]he name of the marine mammal or other identification . . . [t]he estimated or actual birth date of the marine mammal . . . [and the] date of death of the marine mammal and the cause of death when determined." 16 U.S.C. § 1374(c)(10)(A), (B), (H). This confidential commercial information is routinely sought by activists under FOIA. The activists use the FOIA information in order to promote and often exaggerate the deaths of animals in zoos, marine mammal parks and similar facilities and "unambiguously say their goal is to end the use of animals in zoological facilities, agriculture, and other sectors." *See* Stone Testimony, p. 6. Notwithstanding, the D.C. Circuit's "competitors" test means this confidential information that *amici* are required to turn over to the government is provided no protection under *Public Citizen*'s Exemption 4 standard.

Further, the NMFS inventory "information" the activists obtain often is inaccurate, and is used by them to promote further inaccuracies and to cause *amici* reputational (and, thereby, economic) harm. For example, detractors of marine mammal park Dolphin Quest used FOIA to receive confidential information about Dolphin Quest, and then misused that confidential information to make false claims about the facility. As Dr. Stone observed:

> A committee [in the Hawaii legislature] was considering legislation that sought to ban the transfer of cetaceans in human care "for breeding or entertainment purposes." Not only did animal extremists supporting this bill say they used "research" gleaned from the NMFS inventory to support this legislation,

> the bill sponsors included inaccuracies from the NMFS inventory in the actual bill text. *The information about Dolphin Quest from the inventory that was the basis of this "research" was grossly inaccurate and referenced animals that were never at Dolphin Quest and died before Dolphin Quest was even founded.*

Stone Testimony, p. 6. (emphasis added).

PETA, Humane Society International ("HSI") and the Center for Biological Diversity ("CBD") also use FOIA to seek other types of commercial information such as the identities of shippers who transport animals to *amici*, their members and similarly situated entities. For example, in the pending case *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv., supra,* HSI is seeking confidential commercial information required to be provided to the U.S. Department of Fish & Wildlife Services ("FWS") pursuant to 50 C.F.R. § 14.52. This information is housed in the Law Enforcement Management Information System ("LEMIS").

There is real concern that HSI or others will use the LEMIS information in order to harass transport carriers and to disrupt supply chains. As Nick Pologeorgis, whose company is a member of *amicus* FICA, declared in the pending *Humane Society* case:

> [D]isclosure of LEMIS data would greatly increase the risk of supply chain disruption by animal activist groups. For example, an animal activist group could review the information contained in the importer/exporter LEMIS field to identify the company's preferred vendors

> and suppliers and then use that information – along with carrier, source country, port code and date – to learn the company's shipping routes. Armed with this information, animal activist organizations could then target preferred vendors and transport carriers with harassment . . . [thereby] increasing costs, and/or leading to a more limited pool of vendors/suppliers.

Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv., D.D.C. Case No. 16-cv-00720, ECF No. 33-6, p. 22, ¶ 10, Declaration of Nick Pologeorgis (filed May 8, 2018).

In the same case, another declarant, Ira Block, averred:

> Organizations like the Humane Society International ("HSI") seek to damage companies that conduct federally required research on animals. One of their primary strategies is to disrupt supply chains. To do this, these organizations frequently request import/export information from government agencies and use that information to identify research animal suppliers and transporters. They then target those suppliers and transporters with harassment for the purpose of halting or delaying animal research.

Id. at p. 71, ¶ 22, Declaration of Ira Block. It can take years for companies to develop and maintain reliable supply sources and transporters of animals. The names of suppliers and transporters are closely-held, confidential

business information, and should not be made accessible under FOIA – especially to groups, even if they are "non-competitors," that will use this information for disruptive purposes.[10]

Indeed, Messrs. Pologeorgis and Block's fears in this regard are not theoretical. PETA has made FOIA requests to the U.S. Department of Agriculture ("USDA") in order to obtain information regarding airlines transferring animals into the United States. *See* https://www.aphis.usda.gov/foia/foia_logs/2013/April.xlsx ("Request the full USDA APHIS files on the following air carriers with dateline going back as far as USDA APHIS' records go for these air carriers: 1. Air France Cargo (Certificate 57-T-0109)...."). After obtaining such confidential information, PETA uses it to attempt to prevent those airlines from carrying animals, to the detriment of *amici* and similarly situated entities. *See, e.g.*, *Stop Air France From Shipping Monkeys to Their Deaths!*, https://headlines.

10. Another consideration for returning "confidential" to its plain meaning in Exemption 4, is the undue burden in time and expense to submitters in attempting to prove "substantial competitive harm" versus being able to make a simple showing that their confidential information is not normally made publicly available. *See* Patten and Weinstein at 200 (proof of competitive harm "obviously would be difficult and costly to present"). Activist groups are, on the whole, much better-funded than the many small business members of *amici*. The latter do not have the same resources to protect their confidential information from disclosure, as compared to their detractors who seek such information under FOIA. *Cf. Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (expressing concern about "plaintiffs' attempt, assisted as it is by at least five of such [animal rights] organizations, as evidenced by their corporate-level-counsel amici briefs . . . to close small, privately owned zoos.").

peta.org/air-france-stop-shipping-monkeys/ ("Air France even canceled an individual shipment of monkeys after a public outcry by PETA and its supporters.").

As demonstrated by the above examples, the activists' receipt and use of the "confidential" information they currently can and do obtain pursuant to FOIA, can and does cause *amici* and their constituents both reputational and economic harm. In short, *amici* are being penalized by their compliance with laws requiring government disclosure of their confidential information, and by their voluntary willingness to provide the government with confidential information.

The word "confidential" in Exemption 4 should be construed to mean that whatever information a party designates and treats as "confidential" and does not normally share with the public for whatever reason should be protected from disclosure – including for reasons to safeguard against reputational harm or harassment. FMI is right in urging this Court to restore the word "confidential" to its plain meaning. By doing so, the Court will afford *amici* the Exemption 4 coverage to which they rightfully are entitled under FOIA.

III. THE UNSETTLED STATE OF EXEMPTION 4 LEADS TO POTENTIALLY CONFLICTING JURISPRUDENCE, RESULTING IN THE POSSIBILITY OF GAMESMANSHIP

Because the interpretation of the word "confidential" in Exemption 4 has not been definitively ruled on by this Court, parallel – indeed, often virtually identical – court proceedings involving FOIA requests for substantially

the same information will have potentially conflicting outcomes.

For example, currently there are two pending lawsuits in two different jurisdictions, filed months apart, both involving requests from the same government agency pursuant to FOIA for substantially the same information. One is pending before a district court in the District of Columbia. *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. 16-cv-00720 (D.D.C. filed Apr. 18, 2016) (the "HSI Case"). The second was filed in Arizona district court. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, No. 16-cv-00527, (D. Ariz. filed August 9, 2016) (the "CBD Case").

Plaintiffs in the two cases had sought, by way of a FOIA request to the FWS, electronic LEMIS records for the years 2002 through 2010, 2013 and 2014 (the HSI Case), and 2005 to the present (the CBD Case). The requested data sets total tens of thousands of confidential entries relating to imports and exports of animals by private persons and entities of any taxonomic class, whether live, dead, parts or products. In both cases, in response to the activists' requests, FWS withheld certain portions of the LEMIS data under FOIA Exemption 4. HSI and CBD sued – albeit in different jurisdictions.

On March 30, 2018, the district court in the CBD Case granted summary judgment to CBD. 2018 WL 1586648. In articulating the Exemption 4 "confidential" test, the district court explicitly relied on the standard of *Secrets and Smokescreens*, as quoted in *Public Citizen. Id.*, at *4 n. 2. And, in granting CBD's summary judgment motion and directing FWS to provide documents responsive to

CBD's FOIA request, the district court relied on *National Park's* atextual definition of the term "confidential," concluding: "Based on the circumstances of this case, the corporate speculations are insufficient to support exemption . . . CBD is entitled to a dataset including the Exemption 4 information at issue." The Ninth Circuit has stayed the district court's ruling in part. Order, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 18-15997 (9th Cir. June 14, 2018), ECF No. 18.[11] As of the date of this filing, the CBD Case remains pending.

Meanwhile, in the HSI Case in the District of Columbia, cross-motions for summary judgment are pending. In its motion for summary judgment, HSI explicitly relied on the district court's ruling in the CBD Case (and failed to mention that the ruling had been stayed by the Ninth Circuit). *See, e.g.*, HSI Motion for Summary Judgment, HSI Case, ECF No. 36, p. 23 ("the Court in CBD analyzed these exact allegations of harm from many of the exact same companies, and held that FWS did not meet its burden to justify nondisclosure, holding that 'the corporate speculations are insufficient to support exemption.'") (quoting CBD Case, 2018 WL 1586648 at *4-7). The HSI case remains pending.

Unless this Court returns the term "confidential" to its proper, textual meaning, there is a strong possibility that both HSI and CBD will prevail. However, because of the unsettled nature of the term "confidential" in Exemption 4, there also is a possibility that one of the two cases will

11. The Ninth Circuit stayed the release of the documents at issue and remanded to the district court to consider the question of whether a third-party could intervene.

be resolved in favor of the activist group which made the FOIA request, and the other in favor of FWS. If such a scenario occurs, FWS's victory will be pyrrhic. Once the prevailing activist obtains the FOIA'd documents, those confidential documents will be made public.

As this Court recognized when it issued the stay in Petitioner's favor, there is no going back. If the defendant loses somewhere, the defendant loses everywhere.

The detractors of *amici* know this, and use it to their advantage, filing similar cases in multiple jurisdictions. They don't need to win every case. Under the current Exemption 4 jurisprudence, one positive ruling is enough to cause *amici*, their members and similarly situated entities irrecoverable harm. By accepting FMI's Petition, the Court has the ability to rectify this.

CONCLUSION

Words mean what they say. In the absence of an obvious statutory reason to change the plain language meaning of the word "confidential" – which the D.C. Circuit has never provided – the plain language meaning should be retained. Allowing the word "confidential" to stray from its plain meaning has caused harm to *amici*, to similarly situated entities and to many other persons who provide confidential information to the government. If Congress wishes to codify the D.C. Circuit's interpretation of FOIA, it has the power to do so. The D.C. Circuit, however, does not have the right to modify the statute as it has in *National Parks* and *Public Citizen*.

The Court should grant FMI's Petition in order to overrule the D.C. Circuit's antiquated, atextual precedent limiting the scope of FOIA Exemption 4, and to reinvigorate the statute with its plain meaning.

Respectfully submitted,

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No. 18-481

In the Supreme Court of the United States

FOOD MARKETING INSTITUTE, *Petitioner*

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's membership includes companies that do business in each of the 50 states, many of which operate nationwide. These businesses frequently submit sensitive information to the federal government, either voluntarily or under mandatory reporting requirements. Whether such information is subject to public disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is therefore of great importance to the Chamber's members. Accordingly, they have a keen interest in the proper interpretation of FOIA's Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *Id.* § 552(b)(4). As Petitioner has explained, the lower courts have adopted an atextual interpretation of Exemption 4,

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice and have consented to this filing.

and, in doing so, have created substantial uncertainty regarding the exemption's scope. That uncertainty impedes the ability of the Chamber's members to make informed judgments regarding the potential risks of sharing with the government sensitive materials regarding their business operations.

INTRODUCTION AND SUMMARY OF ARGUMENT

To function, the government requires information from the governed. Much of that information is "confidential"—i.e., it is held "in confidence" and is "not publicly disseminated." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (*Critical Mass II*) (Randolph, J., concurring) (quoting *Webster's Third International Dictionary* 476 (1981)). FOIA's Exemption 4 protects such information from public release by the government. It provides that FOIA's command to "make [agency] records promptly available to any person" upon request "does not apply to matters that are * * * commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(a)(3)(A), (b)(4). In keeping with the ordinary meaning of its plain language, this provision should allow businesses to share sensitive commercial information freely with the government, safe in the understanding that the information will not be disclosed under FOIA as long as the submitter has not otherwise made the information available to the general public.

As Petitioner explains, however, the courts of appeals have turned away from Exemption 4's plain text. Instead, based on a selective reading of

legislative history, including witness testimony in a prior Congress's hearing on a predecessor bill, they have held that the party invoking Exemption 4 bears the burden of proving that disclosure "is likely * * * to impair the Government's ability to obtain necessary information in the future" or "to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); see also 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 679 n.20 (D.C. Cir. 1976) ("The party seeking to avoid disclosure bears the burden of proving that the circumstances justify nondisclosure.").

That test has no basis in Exemption 4's text, which nowhere refers to the concepts of substantial competitive harm or the government's ability to obtain necessary information. As the petition explains, see Pet. 17-21, that fundamental flaw alone provides compelling grounds for this Court to grant review and correct the lower courts' deviation from what Congress provided in Exemption 4's plain text. See, *e.g.*, *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms.").

This Court's intervention is particularly needed because the *National Parks* standard has proven to be extraordinarily burdensome and unworkable. Because the rule is not guided by FOIA's text, the courts of appeals have diverged in their interpretation and application of *National Parks*, generating numerous circuit splits and substantial uncertainty regarding Exemption 4's scope. This uncertainty

severely impairs companies' ability to make informed decisions about whether to voluntarily share sensitive information with the government or participate in programs that mandate disclosure of confidential information to government agencies. And if a company does share its information and that information is then the subject of a FOIA request, the company may be required to expend significant resources to establish that the information's public disclosure would cause substantial competitive harm. By contrast, adhering to Exemption 4's plain language would provide greater predictability and simplify litigation for both parties and courts by focusing the inquiry on the straightforward question of whether the information at issue is "confidential" or instead has been publicly disseminated. Courts should ordinarily be able to answer that question without extensive evidentiary proceedings or expert testimony.

Finally, the question presented here has unquestionable importance. Exemption 4 affects industries as diverse as nuclear waste disposal,[2] banking,[3] real estate development,[4] manufacturing,[5] agriculture,[6] and the importation of nonhuman

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[2] *State of Utah* v. *Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001).

[3] *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 242 (2d Cir. 2006).

[4] *Nadler* v. *FDIC*, 92 F.3d 93, 94-95 (2d Cir. 1996).

[5] *United Techs. Corp. ex rel. Pratt & Whitney* v. *FAA*, 102 F.3d 688, 689 (2d Cir. 1996).

[6] *Lion Raisins, Inc.* v. *USDA*, 354 F.3d 1072, 1076 (9th Cir. 2004), *overruled on other grounds by Animal Legal Def. Fund* v. *USDA*, 836 F.3d 987 (9th Cir. 2016).

primates.[7] And the kinds of information that may be at issue in Exemption 4 cases are equally diverse, including among other things: audit reports documenting a corporation's financial position,[8] records of quality inspections at food processing facilities,[9] airplane-engine designs,[10] and "detailed intrastate sales information, including the names of purchasers * * * and price terms."[11] The sheer number of businesses affected by *National Parks*, as well as the amount of litigation generated by its application, underscores the importance of this case for the national economy. This Court's review is urgently needed.

ARGUMENT

I. The Atextual *National Parks* Standard Has Caused Numerous Circuit Splits, Creating Substantial Uncertainty Regarding The Proper Application Of Exemption 4

Unmoored from FOIA's text, the courts of appeals have diverged on the proper interpretation and application of *National Parks*, generating numerous circuit splits. As the petition notes, see Pet. 25-29, many of these disagreements pertain to whether the party invoking Exemption 4 must prove that

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[7] *People for the Ethical Treatment of Animals* v. *Dep't of Health & Human Servs.*, 901 F.3d 343, 347-348 (D.C. Cir. 2018) ("*PETA*").

[8] *Sharyland Water Supply Corp.* v. *Block*, 755 F.2d 397, 400 (5th Cir. 1985).

[9] *Lion Raisins*, 354 F.3d at 1075-1078.

[10] *Pratt & Whitney*, 102 F.3d at 689-690.

[11] *Continental Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 32 (5th Cir. 1975).

disclosure would cause substantial competitive harm. Courts of appeals disagree regarding (1) the level of precision with which the party resisting disclosure must establish a particular competitive harm, such as lost market share,[12] (2) the role that defining a "relevant market" plays in determining the existence of "competition,"[13] (3) whether competitive harm can be shown based on the possibility of future competition from new market entrants,[14] and (4) whether

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[12] See *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 384 (2015) (Thomas, J., dissenting). Compare, *e.g.*, *Utah*, 256 F.3d at 970 (accepting "*potential* economic harm" as sufficient to establish substantial competitive harm), with Pet. App. 5a ("A likelihood of commercial usefulness—without more—is not the same as a likelihood of substantial competitive harm."), and *GC MicroCorp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1114-1115 (9th Cir. 1994) (compelling disclosure despite affidavits from affected businesses explaining that competitors could use information to "alter their subcontracting strategies to better compete"), overruled on other grounds by *Animal Legal Def. Fund* v. *USDA*, 836 F.3d 987 (9th Cir. 2016).

[13] See *N.H. Right to Life*, 136 S. Ct. at 384 (Thomas, J., dissenting). Compare, *e.g.*, *Watkins* v. *Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011) ("[T]he government needs to show there is actual competition in the *relevant market* and a likelihood of substantial injury." (emphasis added)), with *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015) (finding substantial competitive harm even though information at issue was submitted as part of a "non-competitive grant process").

[14] Compare, *e.g.*, *N.H. Right to Life*, 778 F.3d at 51 (emphasizing that a "potential future competitor could take advantage" of information at issue), with *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (holding that argument regarding future competition was impermissibly "speculative").

embarrassment and bad publicity can qualify as cognizable "competitive injur[ies]."[15]

Those are not the only splits that *National Parks* has produced. *National Parks*' first prong—under which information qualifies as "confidential" if disclosure would likely "impair the Government's ability to obtain necessary information in the future," 498 F.2d at 770—has also generated disagreement among the courts of appeals. Taking an expansive approach, the First and D.C. Circuits have adopted a "program effectiveness" test, which allows the government to withhold information when doing so "serves a valuable purpose and is useful for the effective execution of [an agency's] statutory responsibilities." *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983); see also *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 830 F.2d 278, 286-287 (D.C. Cir. 1987) (*Critical Mass I*). The Second Circuit, by contrast, has expressly rejected the "program effectiveness" test. See *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150-151 (2d Cir. 2010). According to the Second Circuit, that test "would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in

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[15] See *N.H. Right to Life*, 136 S. Ct. at 384-385. Compare, *e.g.*, *Nadler*, 92 F.3d at 97 (finding a likelihood of substantial competitive harm when requesters sought information to support their opposition of real estate development project), with *Pub. Citizen Health Research Grp.* v. *FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) ("emphasiz[ing] that" competitive harm "should not be taken to mean simply any injury to competitive position, as might flow from * * * embarrassing publicity" (citation omitted)).

the context of Exemption Five." *Id.* at 150 (citing *Fed. Open Market Comm'n of Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

Similarly, the D.C. and Ninth Circuits disagree about the appropriate standard for determining whether the government has waived its ability to invoke Exemption 4. The D.C. Circuit has developed a "public domain" exception to FOIA's exemptions, under which "the government [or submitter] may not rely on an otherwise valid exemption to justify withholding information that is already in the 'public domain.'" *Students Against Genocide* v. *Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001); see also, *e.g.*, *PETA*, 901 F.3d at 352 (addressing public domain argument in Exemption 4 case). The D.C. Circuit has made clear that the exception is narrow: A court "must be confident that the information sought is *truly public* and that the requester [will] receive no more than what is publicly available before [it] find[s] a waiver." *Students Against Genocide*, 257 F.3d at 836 (emphasis added) (quoting *Cottone* v. *Reno*, 193 F.3d 550, 555 (D.C. Cir. 1999)). "For the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a *permanent public record*.'" *Ibid.* (emphasis added) (quoting *Cottone*, 193 F.3d at 554). Thus, in the D.C. Circuit, a waiver of Exemption 4 occurs *only if* the requested information is *in fact* generally available to the public at large.

In *Watkins*, by contrast, the Ninth Circuit held that "a no-strings-attached disclosure of * * * confidential information to a private third party" effects a waiver, even if the information is not generally available in a "permanent public record," and there is no evidence

that the recipient of the information has *in fact* widely disseminated it to others. 643 F.3d at 1197-1198. This broader approach contrasts with the D.C. Circuit's test, under which it is not enough that a person in possession of the requested information *could* share it with whomever he pleases. *See id.* at 1197 (asserting that D.C. Circuit's "public domain" standard "should not be the *only* test for government waiver").

Most striking of all, the courts of appeals have failed to even decide definitively when *National Parks* applies. Almost two decades after handing down the decision, the D.C. Circuit was still grappling with its consequences in 1992. See *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (*Critical Mass III*). After granting rehearing *en banc* to reconsider *National Parks*, the D.C. Circuit declined to overrule that decision, but it imposed an atextual limitation on its atextual test, "confin[ing] [the *National Parks* standard] to information that persons are *required* to provide to the Government," explaining that voluntarily submitted information should be "treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public." *Id.* at 872 (emphasis added).

To date, only the Tenth Circuit has embraced the D.C. Circuit's distinction between voluntary and involuntary submissions. See *Utah*, 256 F.3d at 969. Other circuits have sidestepped the question, depriving the government and private litigants of guidance on whether their disputes will be subjected to the *National Parks* test. See, *e.g.*, *N.H. Right to Life*, 778 F.3d at 52 n.8; see also *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*,

463 F.3d 239, 245 n.6 (2d Cir. 2006); *Am. Mgmt. Servs., LLC* v. *Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Frazee* v. *Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996).

The Department of Justice's *Guide to the Freedom of Information Act* offers a stark illustration of how much uncertainty *National Parks* has caused. See Department of Justice, *Guide to the Freedom of Information Act*, https://www.justice.gov/oip/doj-guide-freedom-information-act-0. Although the *Guide* addresses some exemptions in less than ten pages, it takes 94 pages and 552 footnotes to describe the fractured case law addressing Exemption 4. The divergent applications of Exemption 4 will persist until this Court intervenes and attacks the root of the problem—the D.C. Circuit's erroneous decision in *National Parks*.

II. *National Parks* Is Extraordinarily Burdensome And Affects A Wide Range Of Industries

A. Adhering To Exemption 4's Plain Language Would Alleviate The Substantial Burdens *National Parks* Imposes

In addition to giving rise to numerous circuit splits, the *National Parks* test has imposed substantial burdens on courts and litigants. The government and the private party resisting disclosure must devote significant time and resources to amass the evidence required to bear their burden of establishing that disclosure would cause substantial competitive harm. See 5 U.S.C. § 552(a)(4)(B); *National Parks*, 547 F.2d at 679 n.20. Frequently, that effort will include costly and time-consuming expert testimony. The trial court must devote time to resolving factual disputes—which

may necessitate a lengthy evidentiary hearing—and the appellate court must wade through the substantial record to review the trial court's findings.[16]

Take this case. The district court here held a two-day bench trial to assess the competitive harm of releasing store-level Supplemental Nutrition Assistance Program ("SNAP") sales data. See Pet. 6. At trial, the Department of Agriculture presented testimony from the president and owner of a supermarket chain, the president and CEO of the National Grocers Association, a senior vice president of marketing of a convenience-store chain, an associate general counsel of Sears Holdings Management Corporation, and an expert witness on the food-retail industry. See Pet. App. 11a-13a. Despite the government's substantial proof (which at a minimum demonstrated that the data "might prove useful" to competitors), the courts below still concluded that the Department had failed to satisfy its burden to justify withholding the SNAP data under the *National Parks* test. *Id.* at 5a; see also *id.* at 18a-20a.

National Parks is another case in point. That case involved a request for financial records that national park concessioners (businesses licensed to sell goods

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[16] The Eighth Circuit sought to counter these considerations by asserting that applying Exemption 4 in accordance with its plain language "would swallow FOIA nearly whole." Pet. App. 4a n.4. But that assertion is unfounded. As Exemption 4's text makes clear, it applies only to "trade secrets" and "privileged or confidential" information that is "commercial or financial" in nature and that the government "obtained" from a third party. 5 U.S.C. § 552(b)(4). The Eighth Circuit provides no reason to believe that a substantial proportion of the mountains of data otherwise subject to disclosure under FOIA satisfy those criteria.

and services in national parks) were required to file with the National Park Service. See *National Parks*, 498 F.2d at 770. The district court found that the "information was of the kind that would not generally be made available for public perusal." *Ibid.* (citation omitted). Under the term's plain meaning, that should have sufficed for the information to qualify as "confidential" under Exemption 4. Yet the D.C. Circuit remanded the case for the district court to "determin[e] whether public disclosure of the information in question pose[d] the likelihood of substantial harm to the competitive positions" of the concessioners. *Id.* at 771.

On remand, the district court held "two days of further evidentiary hearings * * * on the competitive injury issue." *National Parks*, 547 F.2d at 675. After considering this evidence, the court concluded that the bulk of the financial information at issue was protected from disclosure under the standard that the D.C. Circuit had announced. See *ibid.*

On the case's *second* appeal, the D.C. Circuit affirmed in part and reversed in part. *National Parks*, 547 F.2d at 687-688. Parsing the extensive factual record, the court concluded that the district court had clearly erred in "finding that disclosure of the financial information would 'materially increase the opportunity for potentially damaging competition for renewal of concessions [contracts].'" *Id.* at 682. Nevertheless, the D.C. Circuit held that the financial records of five of the seven concessioners involved in the case could be withheld under Exemption 4 because the record demonstrated that those concessioners "face[d] meaningful day-to-day competition with businesses offering similar goods and services both

within and outside the national parks." *Id.* at 681. In reaching that conclusion, the court examined detailed evidence regarding "the location of the park concessioners relative to other similar businesses." *Id.* at 682. The court emphasized that one town near Yellowstone National Park "boast[ed] 47 motels, 9 gas stations and 12 restaurants" that competed with Yellowstone's major concessioner. *Id.* at 682-683. Similarly, the court noted that a concessioner in Grand Canyon National Park faced competition from businesses in "a small community" approximately "eight miles" away that "feature[d] several hundred beds, 1,000 seats for food service and assorted curio shops." *Id.* at 683. Two concessioners failed to present similarly detailed evidence regarding their particular competitive situations. *Ibid.* For those concessioners, the D.C. Circuit ordered another remand for still more proceedings to determine whether the concessioners had satisfied the *National Parks* standard. *Id.* at 687-688.

National Parks thus imposes significant burdens on both litigants and courts, which can readily yield multiple trips between the court of appeals and the district court as both the courts and the parties struggle to deal with the significant evidentiary demands that the test imposes. By contrast, adhering to Exemption 4's text would minimize the burdens for litigants and courts. Exemption 4's plain language sets forth a straightforward inquiry into whether the information at issue is "confidential"—i.e., it has been held "in confidence" and "not publicly disseminated." *Critical Mass II*, 931 F.2d at 947 (Randolph, J., concurring). Resolving that discrete issue generally should not require elaborate evidentiary proceedings

or expert testimony, promoting important interests in administrative simplicity and conserving judicial resources. Cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010). Using a text-based test would also promote greater predictability, which is "valuable to corporations making business and investment decisions." *Ibid.* (citing *First Nat. City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)).

B. *National Parks* Risks Deterring Companies From Sharing Information With The Government And Participating In Government Programs

National Parks also threatens to deter the provision of vital information to the government. The D.C. Circuit itself has recognized that this chilling effect exists with respect to information that private parties are not *required* to provide to the government. As that court has explained, "[i]t is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will * * * jeopardize its continuing ability to secure such data on a cooperative basis." *Critical Mass III*, 975 F.2d at 879. Therefore, as explained above, see *supra* pp. 9-10, the D.C. Circuit has limited the *National Parks* standard so that it applies only to "information submitted under compulsion." *Critical Mass III*, 975 F.2d at 879. Other courts, however, have yet to adopt the D.C. Circuit's limitation on *National Parks*, so in those circuits the chilling effect on voluntary disclosures may persist.

Furthermore, *Critical Mass III* ignores that its concern about deterring the voluntary provision of

information to the government extends to programs like SNAP where the government becomes entitled to receive certain information only after a private party *voluntarily* chooses to participate in the government program. It is equally "a matter of common sense" that private parties may hesitate to participate in voluntary government programs that require disclosure of confidential information to government officials if there is a significant risk that the information may subsequently be publicly released under FOIA. See 975 F.2d at 879.

C. Exemption 4 Affects A Wide Range Of Industries And Types Of Information

The question presented here is unquestionably important. This Court has "never interpreted" Exemption 4, although hundreds of cases address that provision. *N.H. Right to Life*, 136 S. Ct. at 383 (Thomas, J., dissenting). The industries Exemption 4 affects range from the nation's most influential and pervasive—such as banking, see *Inner City Press*, 463 F.3d at 242 (addressing information in bank merger application submitted to Federal Reserve Board)—to those serving far more discrete interests, see, *e.g.*, *PETA*, 901 F.3d at 347-348 (affected parties were importers of nonhuman primates). Affected parties include nuclear power producers and nuclear waste disposal companies. See *Critical Mass I*, 830 F.2d at 279-280; *Utah*, 256 F.3d at 968-969. Some affected parties trade in lumber and others in agricultural products. See *Baker & Hostetler LLP* v. *Dep't of Commerce*, 473 F.3d 312, 315 (D.C. Cir. 2006); *Lion Raisins*, 354 F.3d at 1076. Their work often involves matters of great import, including public health and international relations. See *Public Citizen*, 704 F.2d

at 1282-1284 (affected parties were manufacturers of vision-correcting intraocular lenses); *Stone* v. *Exp.-Imp. Bank of U.S.*, 552 F.2d 132, 133 (5th Cir. 1977) (affected party was an agency of the Soviet Union seeking U.S.-export financing). And many are non-businesses, such as labor unions and Indian tribes. See *American Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 864-865 (2d Cir. 1978); *Utah*, 256 F.3d at 968-969.

The diversity of affected parties reflects the extraordinary number of disclosures required or requested by the federal government. The U.S. Code *requires* private parties to furnish information to the government on such varied matters as securities,[17] banks,[18] labor,[19] food purity,[20] drug safety and efficacy,[21] and even "weather modification activity."[22] And, needless to say, the government may *request* information on a potentially infinite number of subjects, and use the tools at its disposal to ensure compliance.

The types of information at issue in Exemption 4 cases are extraordinarily diverse. The information sought ranges from documentation of agricultural inspections to "information on [automobile] airbag systems." Compare *Lion Raisins*, 354 F.3d at 1075, with *Ctr. for Auto Safety* v. *NHTSA*, 244 F.3d 144, 145-147 (D.C. Cir. 2001). Exemption 4 cases frequently

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[17] See 15 U.S.C. § 77a, *et seq.*

[18] See 12 U.S.C. § 161.

[19] See 29 U.S.C. § 431.

[20] See 7 U.S.C. § 138e.

[21] See 21 U.S.C. § 355(i).

[22] See 15 U.S.C. § 330a.

involve expansive information requests, such as the request to the Bureau of Labor Statistics in *FlightSafety Servs. Corp.* v. *Dep't of Labor*, 326 F.3d 607, 609 (5th Cir. 2003) for "all raw data collected to create" wage determination schedules for various markets. The information requests are also often intrusive, as when the Fifth Circuit declined to prevent the release of "audit reports" and "statements" documenting in detail a corporation's financial health. *Sharyland*, 755 F.2d at 398; see also *Continental Oil*, 519 F.2d at 35 (information at issue was "a contract by contract, field by field exposition of the petitioners' product marketing"). Sometimes, the requested information risks harming the submitter's reputation. See *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1134-1136 (D.C. Cir. 1987) (noting submitter's concern about "adverse publicity" if information regarding its affirmative-action programs was released).

With so much information and such important interests at stake, it is imperative for the Court to grant review to clear up the considerable confusion *National Parks* has created. Refocusing courts on Exemption 4's plain text will alleviate uncertainty, reduce burdens on both courts and litigants, and allow companies to make informed decisions about whether to voluntarily share sensitive information with the government or participate in government programs that entail mandatory disclosures.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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NOVEMBER 2018

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS BRIEF OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION, AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER FOOD MARKETING INSTITUTE

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are retail trade associations whose members are directly affected by the ruling below. The Eighth Circuit's ruling, applying its version of the D.C. Circuit's nebulous *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) standard, would require *amici*'s members to disclose highly sensitive, confidential sales information at a level of granularity that would harm members' ability to compete in an already highly competitive industry. *Amici* support the petition because this case illustrates the tenuous protections afforded confidential information under *National Parks* and the attendant need to return to the plain language of the Freedom of Information Act's ("FOIA") Exemption 4. *Amici* submit this brief to help the Court understand the significant measures they take to protect the information at issue and to amplify the reasons for granting the petition.

Founded in 1961, the National Association of Convenience Stores (NACS) is a non-profit trade association today representing more than 2,500 retail and 1,600 supplier company members nationwide. NACS is the preeminent representative of the interests of convenience store operators. In 2017, the fuel wholesaling and convenience industry employed approximately 2.5 million workers and generated $601.1 billion in total sales.

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1. Pursuant to Supreme Court Rule 37, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief. Amici gave timely notice of their intention to file this brief, and the parties have consented in writing to the filing of this brief under Rule 37(b).

The National Grocers Association (NGA) is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. Independent retailers are privately owned or controlled food retail companies operating in a variety of formats. They are responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes. The NGA appeared as amicus in the Eighth Circuit in support of petitioner's appeal.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, "Main Street" merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the significant driver of the American economy, supporting 42 million working Americans and contributing $2.6 trillion to the annual GDP. As an association representing the interests of the vital retail industry, NRF advocates for fairness and opportunity for all sectors of retail, no matter their size. NRF regularly advocates for the interests of retailers, large and small, before the legislative, executive, and judicial branches of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant FMI's petition and restore the interpretation of FOIA Exemption 4 to its plain language. The record below illustrates the lengths to which retailers go to protect sales data like the individual store-specific Supplemental Nutrition Assistance Program ("SNAP")

redemption data at issue in this case. Applying the plain meaning of Exemption 4, retailers' reasonable efforts to protect against the disclosure of same-store sales data should be enough to satisfy the statute's "confidential" requirement.

Yet *National Parks* has long applied a judicial gloss that unnecessarily limits the protections afforded to private parties who provide confidential data to the federal government to assist it in carrying out its manifold functions. That judicial gloss, which requires the submitter to demonstrate the likelihood that substantial competitive harm will occur from disclosure, sets Exemption 4 apart from many other areas of law that *presume* harm from the disclosure of confidential business information. It also imposes an unreasonable burden on both the submitter of confidential data and the agency FOIA officers, who are not well positioned to assess competitive harm across the range of industries affected by FOIA requests.

This case illustrates the arbitrariness of the *National Parks* standard. The court of appeals denied protection to a retailer's sensitive SNAP data where other courts of appeals, applying their own version of the test, would likely have found the exemption to apply. This Court should grant certiorari to correct what Justice Thomas has called an "atextual test" that has strayed far from the protections afforded by Congress. *New Hampshire Right to Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 383, 385 (2015) (dissenting from denial of certiorari).

ARGUMENT

I. This Court should grant the Petition to protect confidential information in accord with the plain language of FOIA Exemption 4.

FOIA's Exemption 4 is one of several (like Exemption 6) designed to protect private information in the hands of the government. Congress enacted FOIA to provide a means for citizens to know about the activities of their *government*. At the same time, Congress realized that the goal of governmental transparency does not justify unfettered access to *private* information, the public release of which could harm legitimate public and private sector interests. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Exemption 4 thus affords protection to those persons who provide sensitive information to the federal government, while also seeking to ensure that the government has access to the information necessary to perform its broad functions. By its plain terms, Exemption 4 prohibits the disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

The deterrent effect of haphazard government disclosure on a private business's decision to share sensitive information cannot be gainsaid. Exemption 4 reflects the common-sense principle that "[u]nless persons having information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *National Parks*, 498 F.2d at 767.[2]

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2. Under the auspices of *stare decisis*, the D.C. Circuit (in *Critical Mass*, *infra* at 6) amended its *National Parks* standard

Given the government's perpetual need for massive amounts of private, commercial data, there are significant incentives to hew close to the plain language of Exemption 4. Under the ordinary meaning of "confidential," the expectations of the party producing the information are essential to determining FOIA's protections. As this Court has concluded in interpreting the identical term elsewhere in FOIA, "confidential" is "not limited to complete anonymity or secrecy." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 173 (1993) (construing FOIA Exemption 7). Thus, one would have expected courts to adopt a plain meaning definition of the statute's protection for confidential information—*i.e.*, information that is "communicated *in confidence*" or "*intended* to be held in confidence or kept secret." WEBSTER'S SECOND INT'L DICTIONARY 560 (1937) (emphasis added & alterations omitted)).

But as is apparent from this case, for the last forty years, the lower courts have strayed well beyond the common understanding of "confidential" in Exemption 4. The D.C. Circuit's *National Parks* standard, which two members of that court later criticized as "fabricated, out of whole cloth," *Critical Mass Energy Project v. NRC*, 931 F. 2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), restricts the statute's confidentiality protections. Eschewing the common understanding of "confidential," *National Parks* adopted a standard that protects information only where disclosure would "likely cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d

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to create a different test for *voluntarily* produced information, as compared to information produced to the government under compulsion. Yet the statute does not suggest any such different treatment for voluntarily produced or compelled information.

at 770 (emphasis added). As Justice Thomas explained in dissent from denial of certiorari in *New Hampshire Right to Life*, this has led to confusion regarding how to answer *National Parks*' "amorphous" questions. 136 S. Ct. at 384-85.

The Petition offers an ideal vehicle to lay to rest "an atextual test that has different limits in different circuits." *Id.* at 385. The Eighth Circuit's application of *National Parks* exposes retailers to unfettered disclosure of their individual store-level sales data—data which they go to great lengths to keep secret and which would provide meaningful information to actual and potential competitors in both local and regional markets. Exemption 4 was designed to prevent just this sort of misuse of federal disclosure laws. Yet *National Parks* has transformed FOIA into a weapon in the commercial war for market dominance.[3]

A. SNAP store-level redemption data should fall under Exemption 4 because food retailers treat such information as private and confidential.

To protect their market shares and maintain profitability, food retailers have always treated their SNAP store-level redemption data, like all of their

3. A 2017 analysis of FOIA requests "found that public-oriented inquiries by concerned citizens and their advocates account for only a small fraction of the 700,000-plus FOIA requests submitted each year." Elizabeth Williamson, *Businesses Turn to Public Record Requests as Weapons Against Their Critics*, N.Y. Times, Nov. 6, 2018, at A13 (quotations omitted). "The bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors." *Id.* (quotations omitted).

individual store sales data, as highly confidential. Across the food retail industry, stores regularly implement and enforce policies and procedures to maintain the secrecy of their SNAP redemption data. According to NGA's CEO Peter Larkin, a store's sales information, including SNAP redemption data, is not publicly available and is confidential, closely guarded information. (Doc. 185 at 250:25-251:10.)[4] Mr. Larkin explained that such information is not typically known "beyond just a couple of people." (Doc. 186 at 17:1-13.)

The record is replete with statements by key personnel in the industry that they have always kept their store-level sales information, including SNAP redemption data, on a strict "need-to-know" basis. A senior executive at Cumberland Farms, Inc., a convenience store chain in the Northeast, testified that less than 5% of its employees have access to the company's SNAP redemption data, and disclosure of that data outside the company requires a nondisclosure agreement. (Doc. 59-11 at 6.) Dyer Foods, which operates 13 stores in small towns in Tennessee, keeps SNAP redemption data "private" because once you "figure out where the sales are, then [you] go after [that market] a little bit harder." (Doc. 185 at 173:16-22, 195:18-20; *see also* Doc. 119 at 9:19-12:12 (describing Sears Holding Management Corporation's measures to maintain confidentiality of sensitive business information, including store-level sales).)

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4. "Doc." cites herein are to the district court docket on PACER, *Argus Leader Media v. U.S. Dep't of Agric.*, Case No. 4:11-cv-4121-KES (D. S.D.) (Sioux Falls).

Moreover, electronic benefit transfer (EBT) processors, which handle the processing of SNAP transactions, are duty bound to safeguard the secrecy of SNAP redemption data. Each state contracts with an EBT processor to administer SNAP benefits for citizens of that state. Benefit recipients swipe their electronic payment cards (on which SNAP benefit amounts are loaded) at the point of sale ("POS") device in the retailer's store, and the details of the purchase are transmitted to the EBT. The EBT confirms the retailer is an authorized SNAP-participant, checks the amount of benefits available, and instantly transmits an approval (or denial) to the retailer. (Doc. 118 at 7:14-8:18, 9:23-10:10.)

The agreements between states and their EBT processors include strict confidentiality provisions directed at retailer information, such as store-level SNAP redemption data, that EBT processors are required to send to USDA. For instance, Arkansas's EBT agreement provides:

> The Contractor must treat all Information, and *in particular* information relating to *retailers*, all applicants for and recipients of human services ... and providers of such services ..., which is obtained by it through its performance under the Contract, as *private or confidential information* ... and shall restrict access to and disclosure of such Information in compliance with federal and state laws and regulations.

(Doc. 186 at 4 (trial exh. 202, at pp. 17-18) (emphasis added).) The agreement specifically prohibits the EBT from using any such information "in *any* manner except

as necessary for the proper discharge of its obligations." (*Id.* at 17 (emphasis added).)

This strict confidentiality also carries over to third-party researchers retained by retailers to handle a store's sales data. "Retailers are often reticent to provide sales data because they are concerned this data could be used by their competitors to gain an advantage, an understandable concern given the tight margins of food retailers." Molly De Marco, Ph.D., et al., *A Researcher's Checklist for Working with Sales Data to Evaluate Healthy Retail Interventions*, DUKE-UNC USDA CTR. FOR BEHAVIORAL ECON. & HEALTHY FOOD CHOICE RESEARCH, at p.4 (June 2017), available at https://becr.sanford.duke.edu/research-hub/becr-briefs. "Because of this very salient concern to retailers, it is essential to explain how the research team will keep a retailer's sales data ... secure and confidential." *Id.* NACS itself collects and publishes extensive industry information for the benefit of its members, "but not before an extraordinary degree of aggregation and anonymization." (Doc. 59-11 at 15 (members provide their sensitive financial information "on the explicit and repeated condition that it will be kept 'completely' and 'strictly' confidential").)

Food retailers' efforts to maintain the secrecy of their store-level sales information reflect the fact that competition in the retail food marketplace has been fierce for decades, and continues to increase with pressure from superstores, drug stores, warehouse clubs, and small format/limited assortment grocery stores. The introduction of internet-based food delivery services has only heightened that competition. The result is that, for food retailers, average net (pre-tax) profits are under one

percent. (Doc. 139-1 at 3; Doc. 186 at 11:23-12:7; Doc. 185 at 205:12-206:8 (describing food retailers' "razor-thin" margins).)

A retailer's customer base is a valuable asset built over many years by providing excellent customer service and developing in-depth understanding of customer preferences and trends. With tight profit margins, retailers use all available tools to maintain and expand their customer base and revenues, often at the expense of competitors. As trial testimony demonstrated, there is a "relatively inelastic amount of dollars in any given market that are available for food at home," and when a new store succeeds in taking away SNAP business, "[i]t has to be at somebody's expense." (Doc. 186 at 27:10-16, 30:11-16.)

Food retailers protect and expand their business by, among other things, seeking to ascertain competitors' private store sales data. Food retailers know that if competitors discern this data, those competitors can more readily secure a foothold in a local market and target the customers of existing retailers. Every bit of information about competitors' sales helps form a clearer picture of a store's bottom line. As these proceedings showed, the volume of a target store's SNAP redemptions helps competitors derive more accurate estimates of that store's *overall* sales.[5]

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5. Doc. 59-11 at 16 ("[R]etailer-specific transactional data from SNAP sales could be combined with other existing public information ... to reasonably approximate total gross revenues for [that] retailer."); Doc. 59-13 at 7 ("The SNAP redemption data could also provide our competitors with insight with respect to individual Kmart stores' profits."); Doc. 185 at 180:21-25, 192:11-16 (knowing a store's SNAP sales data is "helpful" and can give

All of this leads to a simple conclusion: "There is *no place* where [competitors] can get the actual data" of a store's SNAP sales. (Doc. 186 at 32:3-4 (emphasis added).) Thus, retailers participate in SNAP with the expectation that their store-level redemption data be kept confidential. (*E.g.*, Doc. 59-10 at 1-2, Doc. 59-12 at 1-2, Doc. 59-16 at 2-3, Doc. 59-17 at 1-2, Doc. 59-18 at 1-2.) As one witness put it, "when our members signed up for the program, they *always* felt that it was confidential, private, and it was *never* going to be released." (Doc. 186 at 32:5-7 (emphasis added).) Under the plain meaning of "confidential," food retailers' reasonable expectations of confidentiality should be enough to warrant the protections of Exemption 4.

B. Applying the plain meaning of "confidential" is consistent with the law of unfair competition.

When an information submitter has taken reasonable steps to protect is data as "confidential," there should not be the additional requirement that the submitter prove that the public disclosure of its data will likely cause "substantial competitive harm" (words that do not appear anywhere in the statute). Applying the plain meaning of "confidential" will bring Exemption 4 in line with the many other areas of law where courts protect confidential data without requiring a demonstration of harm.

There is a long-standing presumption of irreparable harm in business tort claims, especially when confidential and proprietary business information is made available to,

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a competitor "a better estimate" of its total sales); *id.* at 196:7-8 (SNAP redemption data gives competitors a "back door into determining what your sales are").

or exploited by, competitors and other market participants. Thus, "[o]ver the years, courts have often ruled that a trade secret claimant is entitled to a rebuttable presumption of irreparable harm for the purposes of injunctive relief ... without regard to proof of a measurable economic injury." 4 Robert M. Milgrim & Eric E. Bensen, *Milgrim on Trade Secrets* § 15.02[1][c] (2018). Under many states' laws, in light of the many precautions that retailers take to safeguard disclosure (*supra* at 7-10),[6] store-level SNAP data would qualify as a trade secret.[7]

Similarly, once a plaintiff has demonstrated a likelihood of success on the merits of a copyright infringement claim, irreparable harm is presumed.

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6. "[A] trade secret proprietor need not take extreme measures; reasonable precautions will suffice." 3 Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks & Monopolies* § 14:26 (4th ed. 2017) (courts consider "the existence ... of an express agreement restricting disclosure," efforts to "prevent acquisition of the information by unauthorized parties," the circumstances under which the information was disclosed, and the extent to which they give rise to a reasonable inference that further disclosure ... is prohibited," and "the degree to which the information has been placed in the public domain").

7. *E.g.*, *Allied Waste Servs. of N. Am., LLC v. Tibble*, 177 F. Supp.3d 1103, 1112 (N.D. Ill. 2016) (noting that trade secrets include "sales data"); *PFS Distrib. Co. v. Raduechel*, 492 F. Supp.2d 1061, 1082 (S.D. Iowa 2007) ("The fact PFS published its annual sales volume on its website does not prevent plaintiffs from claiming the other data used by [defendants], such as ... customer-specific sales figures, are in fact trade secrets."); *Yeiser Research & Dev. LLC v. Teknor Apex Co.*, 281 F. Supp.3d 1021, 1046 (S.D. Cal. 2017) ("sales data may constitute a trade [secret] if it is not readily ascertainable from a public source but instead developed with a substantial amount of time, effort, and money").

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14:06[A] (Matthew Bender rev. ed. 2018). Irreparable injury is also presumed in federal and common law unfair competition cases involving trade name infringement, trade dress infringement, passing off, and general acts of unfair competition. *E.g.*, *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 n.3 (9th Cir. 1989) ("In trademark infringement or unfair competition actions, once the plaintiff establishes a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief is not granted.").

The absurdity of *National Parks*' "substantial competitive harm" standard is perhaps best illustrated by a hypothetical from the employment context. Consider a food retail executive who has access to the very same confidential store sales data, who has signed a confidentiality agreement and accepted related restrictions on post-employment activities. The law *presumes* irreparable harm if that executive seeks to use that information for the benefit of a competitor after separating from employment.[8] Even without evidence of harm, courts will protect an employer's confidential business information with the invasive remedy of an injunction to prevent further breaches by the former employee. "[D]amage from the breach is presumed to be irreparable and the remedy at law is considered inadequate. It is not necessary to show actual damage by instances of successful competition, but it is sufficient

8. *See, e.g.*, *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1231 (11th Cir. 2009) ("[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury"); *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361, 1371 (8th Cir. 1991) (same).

if such competition, in violation of the covenant, may result in injury." 43A C.J.S. *Injunctions* § 95. In those instances, "breach is the controlling factor and injunctive relief follows almost as a matter of course." *A.E.P. Indus. v. McClure*, 302 S.E.2d 754, 762 (N.C. 1983) (finding injunctive relief appropriate where sales representative had access to "confidential ... prices, sales and financial information"). In fact, courts will enter injunctions preventing a former employee from going to work for a competitor based on the mere *threat* of an improper disclosure.[9]

The reasoning behind this principle is patent: a party threatened with irreparable harm should not have to suffer the harm *before* being entitled to injunctive relief. There is very little reason to apply a different principle when a retailer provides the same information to a government agency. The retailer should not have to put on days of expert evidence demonstrating the substantiality of impending harm to be entitled to invoke Exemption 4.

C. The *National Parks*' test puts retailers at a significant procedural disadvantage when invoking Exemption 4.

By abandoning the plain language of FOIA and disregarding the inherent harm in public disclosure of private sector confidential business information, the

9. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) ("inevitable" breaches of non-disclosure agreement may be enjoined in case of a "fierce beverage-industry competition"); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 505 (5th Cir. 1982) (injunctive relief where defendant was working in position for competitor "that would create an inherent threat of disclosure").

National Parks test often leaves businesses without an adequate opportunity to protect such sensitive information in FOIA proceedings. First, there is a serious time crunch when attempting to prove Exemption 4. When notified of a FOIA request as required by Executive Order 12600, retailers must try to prove to the agency that substantial competitive harm is likely to result from disclosure of each type of confidential information covered by the request, and they must try to do this before the 20-day statutory deadline for the agency's response to the requester.[10]

Second, agency FOIA officers are ill-equipped to digest the vagaries of the case law across the circuits—as described by FMI in its Petition (at 24-28)—or apply the facts to that law in predicting the likelihood of substantial competitive harm. Line-drawing as to what is "substantial" and what is not is necessarily subjective, and the government officials making those calls often

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10. 5 U.S.C. § 552(a)(6)(A) requires agencies to make determinations on FOIA requests within twenty working days, and limits extensions of that time period to "unusual circumstances." *Id.* § 552(a)(6)(B). As one author explained:

> Difficult enough to meet for ordinary FOIA requests, these deadlines are often entirely unrealistic in cases involving business records, in which it is often not only necessary to review bulky documents page by page, but to notify the submitter, await a written presentation of its views, and consider those views in light of complex technical and legal questions before arriving at an initial determination that can be communicated to the requester.

Russell B. Stevenson, Jr., *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207, 245 (1982).

have no real industry knowledge. *See* U.S. Dep't of Justice Freedom of Information Act Guide, *Exemption 4, Competitive Harm Prong of* National Parks, 2005 WL 6339534, at *2 (Jan. 1, 2005) ("FOIA Guide") ("Courts have repeatedly rejected competitive harm claims—and even have ordered disclosure—when those claims were advanced by agencies on their own."). Such ill-informed decisions will necessarily result in the government setting industry norms for what business information should be afforded protection, inevitably negating legitimate (and costly) efforts by the private sector to secure protections. (*Supra* at 7-10.)

In contrast, determining whether a submitter took reasonable measures to protect its confidentiality is a simpler, more manageable task for government officials, who themselves are required to follow strict protocols to guard against the release of sensitive (perhaps classified) information. As evident from the plain language of Exemption 4, Congress desired this simplicity. A submitter is in position to provide—on short notice—ample evidence to establish that it protects information as secret. There is no need to march in lawyers and experts to hypothesize what third parties might do with the information if they got their hands on it.

But *National Parks*' "substantial competitive harm" test requires businesses to consider the possibility of time-consuming and costly trials to protect their data each and every time they provide information to the government. Submitters must provide substantial pre- and post-decisional evidentiary support of "competitive harm" for *favorable* agency decisions, but also be prepared to challenge *unfavorable* agency decisions in the district

courts under the APA's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). Businesses often do not have the resources to provide such a costly defense whenever their confidential data is implicated in a FOIA request.

Moreover, all these expenditures of company resources and legal fees are often in vain, because the *National Parks* test yields inconsistent and unpredictable results.[11] *See* FOIA Guide, at *2-4 (different outcomes in cases with similar fact patterns, sometimes resulting from "balancing" extraneous factors such as the "public interest").[12] As the DOJ's FOIA Guide recognizes, "[t]he courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines." *Id.* at *2.

Nor is this private sector damage merely an occasional, tolerable side effect of fostering public access

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11. Businesses responding to agencies seeking an explanation as to why the information sought is "confidential" will often not know what court they may end up in, and thus, will not know which circuit formulation of *National Parks*' "substantial competitive harm" test will apply. *See* 5 U.S.C. § 552(a)(4)(B) (FOIA's general venue provision permitting suit in district in which the complainant resides, or has his principal place of business; where the agency records are situated; or the District of Columbia); *see also infra* at 20-21 (summarizing various circuit tests).

12. Although the D.C. Circuit appeared to reject the use of such "balancing" in *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898 (D.C. Cir. 1999), other courts still engage in it, *e.g.*, *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 971 (10th Cir. 2001) ("we note that the State makes a strong public policy argument in favor of a rough 'balancing of interests' test under Exemption Four").

to government information under FOIA. Each year, thousands of FOIA requests implicating Exemption 4 are submitted to federal agencies. USDA agencies alone applied Exemption 4 more than 400 times in 2017. *See* USDA 2017 Annual FOIA Report, Table V.B.(3); *see also, e.g.*, U.S. DOD 2017 Annual FOIA Report, Table V.B.(3) (989 Exemption 4 cases); U.S. DOL 2017 Annual FOIA Report, Table V.B.(3) (3,686 Exemption 4 cases).[13] Expecting thinly staffed FOIA offices to validly perform all of these competitive harm assessments without abusing their vaguely defined discretion is unrealistic. As a result, the courts are annually burdened with hundreds of cases challenging the results of these assessments, either via *de novo* trials (as in the instant case) or via APA review on the basis of wholly inadequate administrative records (in "reverse-FOIA" cases).[14]

Allowing agencies to apply a straightforward "confidentiality" test—determining that the submitter took reasonable measures to protect the secrecy of the information—would also "serve a pragmatic function, encouraging participation in activities that involve the collection of sensitive information." NAT'L RESEARCH COUNCIL, *Studies of Welfare Populations: Data Collection & Research Issues*, ch. 8, at 230-31 (The Nat'l Academies Press 2001), available at https://www.nap.edu/read/10206/chapter/10. As explained above, as part of their daily operations, SNAP participants implement internal policies

13. These Tables can be found at https://www.foia.gov/reports.html (last visited November 9, 2018).

14. The DOJ's own guide on Exemption 4 alone cites (at least) 20 reverse-FOIA decisions in which courts *denied* protection to a business's confidential business information. *Supra* at 16.

and procedures to ensure their confidential business information is kept secret and does not end up in the hands of their competitors. If food retailers know that those same measures are enough to ensure protection from disclosure under Exemption 4, they will be more inclined to participate in SNAP. *See id.* ("Guarantees of confidentiality are considered essential in encouraging participation in potentially stigmatizing programs."). If the decision below stands, however, some SNAP participants may withdraw, hurting USDA's ability to effectively administer the program.[15]

II. The court of appeals' amorphous "substantial competitive harm" standard merits review.

Retailers' consistent and substantial measures to protect the confidentiality of store-level SNAP redemption data should be enough to satisfy Exemption 4's plain meaning. But *National Parks* has long required more under the guise of its "substantial competitive harm" test. And what that "more" is varies widely by circuit. *See N.H. Right to Life*, 136 S. Ct. at 384-85 (Thomas, J., dissenting). As the Petition explains, two circuits consider the *possible* use of confidential information *itself* constitutes competitive harm, even if negative consequences are not likely to follow; three others (including the Eighth Circuit, Pet. App. 18a-20a) require a specific showing that the disclosing party would suffer a "defined competitive harm"—like lost market share—if competitors used its

15. *See, e.g.*, Doc. 59-13 at 7-8 ("The potential for SNAP redemption data to cause both competitive and reputational harm to the Kmart brand, and any future stores operated by Kmart, will be a major factor in Kmart's decision to continue participating in the SNAP program.").

confidential business information (Pet. 25-26). The circuits cannot even agree on what kind of "competition" must be shown—some will account for hypothetical future competitors, while others (including the Eighth Circuit, Pet. App. 17a) require evidence defining the relevant market in which the entity operates and establishing "actual competition" in that market, which the district court found satisfied in this case (Pet. 26-27).

The "substantial competitive harm" standard has thus sewn confusion in the courts of appeals. *N.H. Right to Life*, 136 S. Ct. at 384-85 (Thomas, J., dissenting). This case exposes the problems inherent in this "substantial likelihood of competitive harm" inquiry. The court of appeals here recognized that the data at issue made it more likely to make models predicting same-store sales more accurate, but denied that this enhanced precision was substantial enough to merit relief. (Pet. App. 5a.)

Nothing in the text of FOIA supports this sort of arbitrary line drawing. Here, the "likelihood of substantial competitive harm" standard enabled the Eighth Circuit to brush off compelling evidence that such real harm would occur—and order the disclosure of retailers' data where other circuits may well have held just the opposite. *See N.H. Right to Life*, 136 S. Ct. at 384 (discussing First Circuit standard holding that competitor's *possible* use of information alone constitutes harm); *Dep't of Interior*, 256 F.3d at 970 (Tenth Circuit rejecting requester's argument that "any effect of disclosure on th[e] competition would be negligible" and holding that documents were properly withheld under Exemption 4 because "evidence demonstrating the existence of *potential* economic harm is sufficient" (emphasis added)).

The record below illustrated in detail that determining where to site a retail food store is far from a precise science. While many sources of information are available to retailers, including firms which specialize in analytics such as market potential analysis, demographic, census, and customer profiling, store-level sales data, including SNAP redemption data, remains closely guarded, for good reason. Sales information is "the most important information ... in the decision whether to enter into a new market or not or buy a new store." (Doc. 185 at 171:2-5.) The government's release of SNAP redemption data is a "game-changer" (Doc. 186 at 17:21) that is "very, very dangerous fuel" in the marketplace (Doc. 185 at 254:21-255:3).

As the Food Marketing Institute ("FMI") explained, disclosure provides retailers "with valuable insights into the operational strengths and weaknesses of their competitors resulting in selecting pricing, market concentration, expansion plans and possible take-over bids facilitated by the knowledge [of the store-level SNAP data]." (Doc. 59-4 at 1-2.) Moreover, if a store's SNAP redemption data reflect a long-term trend of decreasing sales, "it would be reasonable for the competitors to extrapolate from that trend that the store is vulnerable and its market position weak," making it "more likely that the potential competitor would open a competing store in an area." (Doc. 59-8 at 3 (T. Gresham, CEO of Double Quick).)

Contrary to the Eighth Circuit's reasoning, it is *because* so much other information is readily available that the individual store sales data is so valuable. Injecting this additional piece of information—a competitor's store-

level SNAP redemption data—makes the predictive process for expansion into a particular market more accurate. (Doc. 119 at 26:8-9 ("I would say that from the perspective of market research, the more information you can get, the better.").) When inserted into predictive models that utilize other available information, store-level SNAP redemption data would improve the accuracy of what otherwise is often an educated guess. (Doc. 186 at 133:20-137:19.)

Bruce Kondracki, the USDA's expert and VP of Consumer Research at Dakota Worldwide Corporation,[16] explained how software-based predictive modeling for "repositioning" a retailer's stores in the market is at the cutting edge of industry research. High-tech modeling is premised on balancing the model's "demand side" with the "supply side"; while the demand side is relatively simple to calculate and "fairly predictable" (e.g., population, demographics, street and highway networks), the supply side "is, by far, the most time-consuming and most expensive part and most inaccurate part of the whole modeling process." (Doc. 186 at 128:11-132:6.) Store-level sales factor in the supply side, and "without [an] accurate supply side, you'll never balance the model." (*Id.* at 130:19-24.)

If researchers know the *precise* amount of a competitor's store-level sales, a research firm like Dakota (hired by a competitor retailer) can engage in reverse engineering by continually tweaking and re-tweaking the model's algorithms (using other known variables such

16. Dakota is one of the longest-serving market research firms serving the food industry. (Doc. 186 at 121:13-18.)

as demographics and income). (*Id.* at 134:3-135:9.) The updated model can then be used to predict *the client's* sales if it opened a store across the street. (*Id.* at 136:12-22.) The client can "then ... play God," searching an entire marketplace and testing possible expansion locations to determine what "a particular threshold for a store's sale performance" would be *before* pulling the trigger and breaking ground at that site. (*Id.* at 131:24-132:6.) Such enhanced models will result in greatly diminished risk for new market entrants. (*Id.* at 137:1-19.). It is for this reason that the industry so jealously guards against disclosure of this information.

At the same time, the dollar value of SNAP redemptions each of the quarter-million plus SNAP-authorized retailers across the country will not shed any additional light on what the *government* is up to. Argus Leader—and anyone with an internet connection—can already ascertain the aggregate dollar value of SNAP redemptions at the national, state, and even zip code level. (Doc. 118 at 42:14-21, 99:22-100:4.)

The Eighth Circuit's holding that Exemption 4 was not satisfied here only illustrates how far afield the lower courts have strayed from the statute's text. The government, supported by the industry, put on substantial evidence in an effort to meet an atextual "competitive harm" standard. That substantial evidence was deemed insufficient by the court of appeals, where other courts may well have reached a different conclusion on the same evidence. But puzzling over what constitutes "competitive harm" is entirely unnecessary. This Court should grant the Petition to restore Exemption 4 to its textual roots.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant FMI's Petition for Writ of Certiorari.

DATED this 14th day of November, 2018.

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No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus requiring the Government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the requested information could be potentially useful to a competitor, or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share?

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 100 cases of greatest importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Exemption 4 of the Freedom of Information Act (FOIA) protects against disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). When the RLC's members disclose confidential information to the

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* timely notified all parties of their intention to file this brief. Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

government, they rely on Exemption 4 to ensure that the confidential information will not be released to the general public. The Eighth Circuit's decision artificially narrows Exemption 4 by applying it only if disclosure is "likely ... to cause substantial harm to the competitive position of" the provider. Pet. App. 3a. Thus, even if a company can show that disclosure of confidential information would be harmful, the Eighth Circuit nonetheless requires disclosure so long as that harm does not meet the vague requirement of being "substantial." Worse, if a company concludes, and provides evidence, that disclosure of its confidential information is likely to cause substantial competitive harm, the Eighth Circuit's decision allows a federal judge to override the company's assessment—even though the company is in a far better position than the court to predict the competitive consequences of disclosure.

Exemption 4, by its terms, applies to *all* confidential information. Thus, if a company discloses information to the government but otherwise keeps that information confidential, Exemption 4 requires the government to respect the company's confidentiality decision. The RLC's members have a strong interest in ensuring that Exemption 4 is applied according to its unambiguous terms.

SUMMARY OF ARGUMENT

The Court should grant certiorari to reject "the rule favoring narrow construction of FOIA exemptions." *Milner v. Dep't of the Navy*, 562 U.S. 562, 579-80 (2011).

This Court has never articulated a principled basis for the narrow-construction canon. The canon appears to have originated in ill-considered dicta from a line of D.C. Circuit cases from the early 1970s. In *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), this Court adopted the narrow-construction canon, citing only the D.C. Circuit cases in support. Subsequent cases have repeated the canon, citing previous cases. But this Court has never explained the basis for this canon, beyond adverting to FOIA's supposed general policy in favor of disclosure.

That supposed general policy is an insufficient basis for inferring a narrow-construction canon. Last Term, this Court rejected a nearly identical narrow-construction canon for Fair Labor Standards Act (FLSA) exemptions. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). The employee argued that because the FLSA is generally intended to assist employees, exemptions to the FLSA should be construed narrowly. This Court disagreed, finding that the FLSA's exemptions should not be artificially narrowed based on policy concerns. Here, too, Exemption 4—and FOIA's other exemptions—should be applied according to their terms.

At a minimum, the narrow-construction canon should not be used to narrow an *unambiguous* statute. The Eighth Circuit expressly acknowledged that its interpretation of Exemption 4 deviated from the dictionary definition of "confidential," but it held that the narrow-construction canon gave it license to ignore the exemption's plain text. The Eighth Circuit erred in unapologetically rewriting a federal statute.

Certiorari is warranted to eliminate the narrow-construction canon. That canon has a significant impact in lower-court FOIA litigation, including in cases involving sensitive law enforcement and national security materials. In such cases, as in this case, there is no basis for courts to put a thumb on the scale in favor of disclosure.

ARGUMENT

The RLC agrees with Petitioner that Exemption 4 of FOIA applies to all confidential information, rather than a limited subset of confidential information that, in the view of a federal district judge, would cause "substantial competitive harm" if released. As Petitioner explains, the circuits have fractured on the interpretation of Exemption 4, devising a series of complex tests untethered from the statutory requirement that the information be "confidential." The Court should hold that "confidential" means "confidential," rather than arbitrarily narrowing Exemption 4 based on a generalized intuition that the more disclosure, the better.

The RLC writes separately to urge the Court to reject "the rule favoring narrow construction of FOIA exemptions." *Milner*, 562 U.S. at 579-80. The Eighth Circuit applied that rule in rejecting Petitioner's interpretation of Exemption 4. Pet. App. 4 n.4. Yet this Court has never articulated any principled basis for this canon, and none exists. Further, the canon improperly encourages courts to artificially narrow the scope of unambiguous FOIA exemptions—as occurred in this case. This Court recently rejected a similarly

unprincipled narrow-construction canon for FLSA exemptions. *See Encino*, 138 S. Ct. at 1142. This Court should grant certiorari to reject the narrow-construction canon in this case as well.

I. This Court Has Never Articulated A Principled Basis For The Narrow-Construction Canon.

The narrow-construction canon for FOIA exemptions has humble roots. It appears to have originated in poorly-explained dicta from D.C. Circuit decisions in the early 1970s. This Court then imported the narrow-construction canon from the D.C. Circuit, citing the D.C. Circuit's dicta and offering no additional explanation. Later decisions of this Court have continued reciting the narrow-construction canon, eventually characterizing it as "oft-repeated" and "consistently stated." But this Court's sole support for this canon has been its own prior cases; it has never offered any principled explanation for the canon.

The narrow-construction canon appears to have originated in two D.C. Circuit cases: *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), and *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970). *Bristol-Myers* declared that "[t]he legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed," 424 F.2d at 938, while *Grumman* similarly asserted that "the Act requires that exemptions be narrowly construed," 425 F.2d at 580 n.5. In support of this proposition, both cases cited

the statute now codified at 5 U.S.C. § 552(d).[2] That statute, however, does not create a narrow-construction canon. It actually says the exact opposite: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section*." 5 U.S.C. § 552(d) (emphasis added). Thus, Congress insisted that courts follow the *specific* terms of the exemptions, rather than artificially narrowing them via a judge-made narrow-construction canon.

Nonetheless, after creating a narrow-construction canon out of whole cloth, the D.C. Circuit continued to invoke it, citing only its prior cases for support.

- In *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971), the D.C. Circuit asserted that Exemption 4 "is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose." *Id.* at 1078. The court offered no additional explanation but inserted a footnote consisting of a string-cite of a Senate Report, a House Report, *Bristol-Myers*, *Grumman*, a district court case, and seven additional cases that do not mention FOIA, including two 19th-century cases. *Id.* at 1078 n.46.

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[2] At the time, the statute was codified at 5 U.S.C. § 552(c). *See Bristol-Myers*, 424 F.2d at 938; *Grumman*, 425 F.2d at 580 n.5.

- In *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), the D.C. Circuit recited the same canon, citing *Bristol-Myers* for support. *Id.* at 672.
- In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), the D.C. Circuit repeated the canon, citing *Getman*, *Bristol-Myers*, and a district court case that relied on *Bristol-Myers*. *Id.* at 823 & n.11.
- The *Vaughn* case later returned to the D.C. Circuit, and the court declared that it had "repeatedly stated" that exemptions must be construed narrowly. *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975). The court's support for this proposition consisted of *Soucie* and the first iteration of *Vaughn*. *Id.* at 1142 nn.23-24.

This Court first recited the narrow-construction canon in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). In that case, the Court stated that FOIA's exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* at 361. Its sole authority for this proposition consisted of three of the D.C. Circuit cases cited above: the two *Vaughn* cases and *Soucie*. *Id.* The Court then offered a block-quotation from a prior case from this Court that did not recite a narrow-construction canon, but instead merely characterized FOIA as "broadly conceived." *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)). That block-quotation also cited a Senate Report that did not endorse a narrow-construction canon either, but instead observed that "[s]uccess lies

in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Id.* (quoting S. Rep. No. 89-813, at 3 (1965)). No additional explanation for the narrow-construction canon was provided.

Rose was apparently sufficient to give the narrow-construction canon a foothold in the law. After *Rose*, this Court continued reciting the narrow-construction canon, citing only its prior cases and offering no additional explanation. The Court next invoked the narrow-construction canon in *FBI v. Abramson*, 456 U.S. 615 (1982). Even though *Abramson* was only the second time that this Court had mentioned the canon, the Court characterized it as "oft-repeated"—citing only *Rose* for support. *Id.* at 630. The canon appeared for a third time in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), in which the Court declared that "the mandate of the FOIA calls for broad disclosure of Government records," and thus asserted that "for this reason we have consistently stated that FOIA exemptions are to be narrowly construed." *Id.* at 8 (quotation marks and brackets omitted). Despite the assertion that this canon was "consistently" applied, the only two cases cited in support of this proposition were *Abramson* and *Rose*. *Id.*

Subsequent cases from this Court continued to characterize the narrow-construction canon as a consistently applied rule, citing prior cases in the jurisprudential chain. *See, e.g., U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (stating that "these exemptions have been consistently given a narrow compass" and citing *Julian* and *Abramson*);

John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (similar, citing *Rose*); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 180 (1991) (similar, citing *John Doe*). In *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), this Court cast the narrow-construction canon as an "obligation," citing only *John Doe* and *Rose* for support. *Id.* at 181. More recent cases have continued to assert the canon and cite older cases without additional explanation. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citing *Tax Analysts* and *Abramson*); *Milner*, 562 U.S. at 571 (citing *Tax Analysts*, *Klamath*, and *Landano*).

To sum up, the narrow-construction canon has its origins in D.C. Circuit cases decided almost 50 years ago that relied exclusively on a statute reciting the exact opposite of a narrow-construction canon. A canon with such a weak legal basis is ripe for reconsideration.

II. There Is No Basis For The Narrow-Construction Canon.

This Court's sole justification for the narrow-construction canon has been the "basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361; *see Julian*, 486 U.S. at 8 (citing FOIA's "mandate" of "broad disclosure"). This general policy is not a legitimate basis for a narrow-construction canon. This Court rejected a similar narrow-construction canon for FLSA exemptions in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018). The Court's analysis in *Encino* requires rejecting the narrow-construction canon for FOIA exemptions as well.

The FLSA is structured similarly to FOIA. FOIA imposes a general obligation for the government to make information available to the public, 5 U.S.C. § 552(a), subject to several enumerated exemptions, 5 U.S.C. § 552(b)(1)-(9). Similarly, the FLSA imposes a general obligation for employers to pay minimum wage and overtime pay to employees, 29 U.S.C. §§ 206, 207, subject to several enumerated exemptions, 29 U.S.C. § 213(a)(1)-(19) (exemptions to both minimum wage and overtime requirements), 29 U.S.C. § 213(b)(1)-(30) (additional exemptions to overtime requirement).

In *Encino*, this Court considered whether service advisors at car dealerships fell within the FLSA's exemption from the overtime-pay requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). The Court held that the exemption applied, reasoning that service advisors were "salesmen" who were "primarily engaged in ... servicing automobiles." 138 S. Ct. at 1140-41. The Court rejected the employees' argument that the exemption applied only to salesman who *sold* (as opposed to serviced) automobiles. *Id.* at 1141-42.

The employees also "invoked the principle that exemptions to the FLSA should be construed narrowly." *Id.* at 1142. This Court "reject[ed] the principle as a useful guidepost for interpreting the FLSA." *Id.* It explained that "[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." *Id.* (quotation marks

omitted). It noted that the "narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs," emphasizing that it "is quite mistaken to assume ... that whatever might appear to further the statute's primary objective must be the law." *Id.* (quotation marks, alterations, and citations omitted). The Court also observed that the FLSA has numerous exemptions, and "[t]hose exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* Thus, this Court held, "we thus have no license to give the exemption anything but a fair reading." *Id.*

Identical reasoning requires rejecting the narrow-construction for FOIA exemptions. First, like the FLSA, FOIA "gives no textual indication that its exemptions should be construed narrowly." *Id.* (quotation marks omitted). To the contrary, FOIA instructs that exemptions should be construed according to their terms: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.*" 5 U.S.C. § 552(d) (emphasis added). Contrary to the 1970s D.C. Circuit cases in which the narrow-construction canon originated, this provision does not provide license to a federal court to interpret FOIA exemptions more narrowly than their text would dictate.

Second, although FOIA doubtless was enacted with the general purpose of facilitating disclosure of government information, it "is quite mistaken to assume ... that whatever might appear to further the statute's primary objective must be the law." *Encino*,

138 S. Ct. at 1142 (quotation marks omitted). Just as the FLSA's exemptions "are as much a part of the FLSA's purpose as the overtime-pay requirement," *id.*, FOIA's exemptions are as much a part of its purpose as its general disclosure requirement.

Indeed, it is arbitrary to focus on FOIA's "mandate" of "broad disclosure," *Julian*, 486 U.S. at 8, as a basis for construing Exemption 4. One could just as easily say that *Exemption 4*'s "mandate" is one of broad protection for confidential information acquired from third parties, based on *Exemption 4*'s policy that FOIA should not harm the confidentiality interests of private parties who give financial information to the government. And by defining Exemption 4's mandate that way, one could just as easily say that Exemption 4 should be construed *broadly* to achieve that mandate. That reasoning is faulty, just as the reasoning underlying the narrow-construction canon is faulty. In reality, FOIA has multiple objectives reflected in both the disclosure obligation and the exemptions, and those objectives are best advanced by applying the statute as written. *Encino*, 138 S. Ct. at 1142 ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage" (quotation marks omitted)).

The narrow-construction canon also produces counterintuitive results with respect to other FOIA exemptions. For instance, FOIA Exemption 1 applies to information kept secret "in the interest of national defense or foreign policy," while FOIA Exemption 7 applies to certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(1), (7).

Under the narrow-construction canon, courts would assume that Congress intended to disfavor national security and law enforcement interests, and therefore that those exemptions should be construed narrowly. Yet there is nothing in the statutory text, or even in broad conceptions of policy, that would support judge-driven efforts to undermine national security and law enforcement efforts by artificially narrowing the scope of these exemptions.

Indeed, concerns about law enforcement interests led the D.C. Circuit to make the opposite error: to arbitrarily *broaden* the scope of a different FOIA exemption based on a perception that FOIA, as written, did not protect law enforcement interests well enough. Exemption 2 of FOIA protects materials "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), yet in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), *abrogated by Milner v. Department of the Navy*, 562 U.S. 562 (2011), the D.C. Circuit expanded that exception to apply to any materials that might risk "circumvention of agency regulations or statutes," in light of its assessment that Congress would not have wanted to undermine "the effectiveness of law enforcement agencies." 670 F.2d at 1074. This Court rejected that countertextual interpretation in *Milner*, explaining that *Crooker*'s interpretation requires "cutting out some words and pasting in others until little of the actual provision remains." 562 U.S. at 573 (citation and quotation marks omitted). As *Milner* demonstrates, FOIA's exemptions should be construed based on what they say, rather

than based on courts' intuitions about whether disclosure is good or bad. The same reasoning justifies eliminating the narrow-construction canon.

III. The Narrow-Construction Canon Is Especially Pernicious As Applied To Unambiguous Statutes Like Exemption 4.

At a minimum, the Court should reject the application of the narrow-construction canon in a case like this one, where the exemption at issue is unambiguous.

The application of the narrow-construction canon is even more troubling in this case than in *Encino*. In *Encino*, the employee did not argue that an unambiguous statute should be modified based on policy concerns; rather, he merely argued that a statutory ambiguity should be resolved in the employee's favor. In particular, the employee contended that the exemption at issue was ambiguous as to whether it applied only to salesmen who sold, or also to salesmen who serviced, and that the employee should prevail in light of that ambiguity. *Encino*, 138 S. Ct. at 1141-42.

Here, by contrast, the Eighth Circuit applied the narrow-construction canon to modify an *unambiguous* statute. The word "confidential" is not ambiguous. "Confidential" is an ordinary English word that carries a well-understood meaning: a document is "confidential" if it is kept secret, regardless of whether its disclosure will cause competitive harm. *See* Pet. 18 & nn.11-12 (citing dictionary definitions of "confidential"). To be sure, there may be factual

disputes as to whether a particular document actually *is* confidential—for instance, litigants may disagree about whether the document is customarily disclosed. But the *word* confidential is not ambiguous.

Yet the Eighth Circuit applied the narrow-construction canon nonetheless. It expressly rejected the argument that the word "confidential" should be construed according to its "dictionary definition[]." Pet. App. 4a n.4. It found this argument to be "precluded by the Supreme Court's admonition that FOIA exemptions must be narrowly construed." *Id.* (quotation marks omitted). It reasoned that if dictionary definitions were applied, "Exemption 4 would swallow FOIA nearly whole." *Id.* Thus, it applied a rule that has no basis whatsoever in the statutory text: the provider of the information must proffer evidence not only that the information is confidential, but evidence of "actual competition and the likelihood of substantial competitive injury." Pet. App. 3a (citation and quotation marks omitted).

The Eighth Circuit's reasoning is pernicious because it opens the door for courts to alter FOIA to conform to their policy preferences. If the narrow-construction canon is merely a tool to resolve ambiguities, the canon will apply only in the limited subset of cases where a statute is genuinely ambiguous. But if the canon can be used to alter unambiguous exemptions, it becomes much more powerful.

The Eighth Circuit applied the canon to rewrite Exemption 4, but courts could apply the canon to rewrite other exemptions as well. For instance, a court may disagree with Congress's policy judgment that

information "related solely to the internal personnel rules and practices of an agency," or information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions," is exempted from disclosure. 5 U.S.C. § 552(b)(2), (8). Thus, a court could take it upon itself to narrow those exemptions only to documents that it deems, in its sole discretion, to be particularly sensitive—in contravention of those exemptions' plain terms.

At a minimum, this Court should grant certiorari to clarify that, even if the narrow-construction canon applies in some contexts, it does not apply where there is no statutory ambiguity to resolve. Here, the word "confidential" is unambiguous and the statute should be applied as written.

IV. The Court Should Grant Certiorari Because The Narrow-Construction Canon Has A Significant Impact In Lower Courts.

As this case illustrates, the narrow-construction canon significantly affects FOIA litigation in the lower courts. Thus, whether that canon should be retained is a question of sufficient practical importance to warrant granting certiorari.

Lower courts routinely invoke the narrow-construction canon in decisions ordering disclosure of documents, including in cases involving documents related to law enforcement and national security. *See, e.g., ACLU v. U.S. Dep't of Justice*, 880 F.3d 473, 482-83

(9th Cir. 2018) (requiring disclosure of materials addressing electronic surveillance and tracking devices); *Citizens of Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 681-82 (D.C. Cir. 2017) (vacating decision exempting FBI correspondence related to public corruption investigation); *Lucaj v. FBI*, 852 F.3d 541, 549 (6th Cir. 2017) (requiring disclosure of documents shared between FBI and foreign government); *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 103, 111 (2d Cir. 2014) (requiring disclosure of documents related to targeted killings via drone strikes).

ACLU v. Department of Defense, 543 F.3d 59 (2d Cir. 2008), *summarily vacated by* 558 U.S. 1042 (2009), provides an illustrative example of the canon's practical impact. In that case, the requestor sought disclosure of photographs depicting treatment of detainees by United States soldiers in Iraq and Afghanistan. *Id.* at 63. The government sought to withhold the photographs under the FOIA exemption for law enforcement records that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). It contended that releasing the information could endanger the lives of American troops in the Middle East. 543 F.3d at 63. The Second Circuit rejected this argument, holding instead that the exemption applied only if the government identified *specific* individuals who were endangered. *Id.* at 70. The court expressly stated that this interpretation was driven by the narrow-construction canon:

> The defendants' construction of "any individual" as not requiring the government to name or even roughly identify any individual ... is not a narrow one. The reading of "any individual" as requiring a FOIA defendant to identify an individual with reasonable specificity is a narrower construction, and to be preferred on that ground alone. ... [T]he principle that FOIA exemptions are to be construed narrowly cabins the permissible construction of the phrase "any individual." A construction that requires the agency to identify with reasonable specificity the person or persons who could reasonably be expected to be endangered accords with that principle. The defendants' unbounded interpretation does not.

Id. The Second Circuit's decision precipitated the passage of special legislation intended to protect the photographs from disclosure, and this Court vacated the Second Circuit's decision in light of that legislation. *Dep't of Defense v. ACLU*, 558 U.S. 1042 (2009).

The RLC does not take a position on how any of these cases should have been decided in the absence of a narrow-construction canon. Rather, the RLC merely emphasizes that the narrow-construction canon significantly affects FOIA litigation in practice. This Court's review is warranted to clarify that courts should interpret FOIA exemptions according to their terms, rather than distorting those exemptions via a narrow-construction canon.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX VOLUME I

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PETITION FOR WRIT OF CERTIORARI FILED OCT. 11, 2018
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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
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Argus Leader Media v. Food Marketing Institute

DATE	PROCEEDINGS
02/15/2017	Civil case docketed. [4501828] [17-1346] (CYZ) [Entered: 02/15/2017 10:35 AM]
02/27/2017	STATEMENT of issues, METHOD of Appendix (separate), filed by Appellant Food Marketing Institute - w/service 02/27/2017. [4505827] [17-1346]--[Edited 02/28/2017 by MER] (DRF) [Entered: 02/27/2017 02:10 PM]
03/30/2017	RECORD FILED - EXHIBITS, Comments: 1 expandable folder of trial exhibits - see attached Exhibit List, Source Location: DC [4518402] [17-1346] (CYZ) [Entered: 03/30/2017 02:31 PM]
06/22/2017	RECORD FILED - SEALED TRANSCRIPT, Location STP, Comments: REBUTTAL TESTIMONY - Dist. Ct. Doc. #187, Source Location: DC, Dt. of Proceeding/Hearing: 05/25/2016, No. of Pgs.: 35, Court Reporter: Connelly, Jill Maurine - COPY DO NOT RETURN

DATE	PROCEEDINGS
	[4549947] [17-1346] (CYZ) [Entered: 06/22/2017 10:48 AM]
06/22/2017	RECORD FILED - TRANSCRIPT, Location STP, Comments: PRETRIAL CONFERENCE - Dist. Ct. Doc. #184, Source Location: DC, Dt. of Proceeding/Hearing: 05/19/2016, No. of Pgs.: 23, Court Reporter: Connelly, Jill Maurine - COPY DO NOT RETURN [4549948] [17-1346] (CYZ) [Entered: 06/22/2017 10:49 AM]
06/22/2017	RECORD FILED - TRIAL TRANSCRIPTS, Location STP, Comments: VOLUMES I & II - Dist. Ct. Doc. #185 & 185-1, Source Location: DC, Dt. of Proceeding/Hearing: 05/24/2016-05/25/2016, Court Reporter: Connelly, Jill Maurine - COPY DO NOT RETURN [4549951] [17-1346] (CYZ) [Entered: 06/22/2017 10:53 AM]
08/16/2017	**BRIEF FILED** - APPELLANT BRIEF filed by Food Marketing Institute. w/service 08/15/2017, Length: 12,822 words **10 COPIES OF PAPER BRIEFS FROM Food Marketing Institute due 08/21/2017 WITH certificate of service for paper briefs.** Brief of Appellee Argus Leader Media due on 09/15/2017 [4568987] [17-1346] (MER) [Entered: 08/16/2017 10:43 AM]

DATE	PROCEEDINGS
08/18/2017	MOTION interested party, National Grocers Association, for leave to file amicus curiae brief on behalf of Appellant - Food Marketing Institute. w/service 08/18/2017. [4570511] [17-1346] ATTACHED REQUIRED CERTIFICATE OF COMPLIANCE--[Edited 08/21/2017 by MER] (SDF) [Entered: 08/18/2017 04:34 PM]
08/21/2017	RESPONSE in opposition to motion [4570511-2], Interested Party motion [4570511-3] filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media, w/service 08/21/2017. [4570744] [17-1346] (JEA) [Entered: 08/21/2017 02:03 PM]
08/21/2017	PUBLIC DOCKET NOTE: Contacted counsel for interested party, National Grocers Association, and requested the required certificate of compliance for Motion for Leave to file Amicus Brief on behalf of Appellant. [17-1346] (MER) [Entered: 08/21/2017 02:18 PM]
08/21/2017	RECORD FILED - APLNT/PET APPENDIX, 1 volume, Location STL, Comments: 3 copies [4571154] [17-1346] (MER) [Entered: 08/22/2017 01:54 PM]

DATE	PROCEEDINGS
08/23/2017	JUDGE ORDER:Granting [4570511-2] motion leave to file amicus brief. National Grocers Association in 17-1346 has been changed to an amicus in this case. Adp Sep 2017 [4571851] [17-1346] (MER) [Entered: 08/23/2017 04:02 PM]
08/23/2017	**BRIEF FILED** - AMICUS BRIEF filed by National Grocers Association w/service 08/23/2017, Length: 3,392 words **10 COPIES OF PAPER BRIEFS FROM National Grocers Association due 08/28/2017 WITH certificate of service for paper briefs** [4571862] [17-1346] (MER) [Entered: 08/23/2017 04:14 PM]
10/17/2017	**BRIEF FILED** - APPELLEE BRIEF filed by Argus Leader Media, w/service 10/16/2017 , Length: 12,628 words **10 COPIES OF PAPER BRIEFS FROM Argus Leader Media due 10/23/2017 WITH certificate of service for paper briefs.** Reply brief of Food Marketing Institute due on 10/31/2017. [4590502] [17-1346] (MER) [Entered: 10/17/2017 04:07 PM]
10/23/2017	RECORD FILED - APLEE/RES APPENDIX, 1 volume, Location STL, Comments: 3 copies [4592844] [17-1346] (MER) [Entered: 10/24/2017 11:27 AM]

DATE	PROCEEDINGS
11/30/2017	**BRIEF FILED** - APPELLANT REPLY BRIEF filed by Food Marketing Institute. w/service 11/30/2017 , Length: 6,499 words **10 COPIES OF PAPER BRIEFS WITHOUT THE APPELLATE PDF HEADER FROM Food Marketing Institute due 12/05/2017 WITH certificate of service for paper briefs** [4605783] [17-1346] (MER) [Entered: 11/30/2017 04:12 PM]
03/14/2018	**ARGUED & SUBMITTED in St. Paul** to Judges Raymond W. Gruender, C. Arlen Beam, Jane Kelly on 03/14/2018 Mr. Gavin R. Villareal for Appellant Food Marketing Institute and Mr. Jon E. Arneson for Appellee Argus Leader Media. Rebuttal by Mr. Gavin R. Villareal for Food Marketing Institute RECORDED. Click Here To Listen to Oral Argument [4639263] [17-1346] (JMM) [Entered: 03/14/2018 10:03 AM]
05/08/2018	OPINION FILED - THE COURT: Raymond W. Gruender, C. Arlen Beam and Jane Kelly AUTHORING JUDGE: Jane Kelly (PUBLISHED) [4659075] [17-1346] (MER) [Entered: 05/08/2018 08:29 AM]

DATE	PROCEEDINGS
05/08/2018	**JUDGMENT FILED** - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. RAYMOND W. GRUENDER, C. ARLEN BEAM and JANE KELLY Hrg Mar 2018 [4659084] [17-1346] (MER) [Entered: 05/08/2018 08:37 AM]
05/15/2018	MOTION for attorney fees in the amount of to be determined on remand., filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media w/service 05/15/2018. [4661656] [17-1346] (JEA) [Entered: 05/15/2018 11:37 AM]
05/15/2018	MOTION for limited remand, filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media w/service 05/15/2018. [4661673] [17-1346] (JEA) [Entered: 05/15/2018 11:45 AM]
05/21/2018	RESPONSE in opposition to motion for remand [4661673-2], motion for attorney fees [4661656-2] filed by Attorney Mr. Gavin R. Villareal for Appellant Food Marketing Institute, w/service 05/21/2018. [4663637] [17-1346] (GRV) [Entered: 05/21/2018 11:28 AM]

DATE	PROCEEDINGS
06/04/2018	JUDGE ORDER: Pursuant to Eighth Circuit Rule 47C(b), Argus Leader's motion for limited remand dated May 15, 2018, is granted. The case is remanded to the district court with instructions to determine the availability of attorney's fees pursuant to 5 U.S.C. § 552, and to enter judgment accordingly. [4661656-2] [4661673-2] Hrg Mar 2018 [4668745] [17-1346] (MER) [Entered: 06/04/2018 01:26 PM]
06/21/2018	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Food Marketing Institute w/service 06/21/2018 [4674655] [17-1346] (GRV) [Entered: 06/21/2018 09:52 AM]
07/13/2018	JUDGE ORDER:Denying [4674655-2] petition for enbanc rehearing filed by Appellant Food Marketing Institute. The petition for panel rehearing is also denied. [4674655-3] PUBLISHED ORDER. Hrg Mar 2018 [4682115] [17-1346] (MER) [Entered: 07/13/2018 10:03 AM]
07/19/2018	MOTION to stay mandate, filed by Attorney Mr. Gavin R. Villareal for Appellant Food Marketing Institute w/service 07/19/2018. [4684120] [17-1346]--[Edited 07/19/2018 by MER] (GRV) [Entered: 07/19/2018 08:52 AM]

DATE	PROCEEDINGS
07/30/2018	RESPONSE in opposition to motion to stay the mandate [4684120-2] filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media, w/service 07/30/2018. [4687715] [17-1346] (JEA) [Entered: 07/30/2018 12:38 PM]
07/31/2018	REPLY to response [4687715-2] filed by Appellant Food Marketing Institute w/service 07/31/2018. [4688670] [17-1346] (GRV) [Entered: 07/31/2018 05:39 PM]
08/07/2018	JUDGE ORDER:Denying [4684120-2] motion to stay the mandate filed by Mr. Gavin R. Villareal for Appellant Food Marketing Institute. Hrg Mar 2018 [4690894] [17-1346] (MER) [Entered: 08/07/2018 11:15 AM]
08/07/2018	MANDATE ISSUED. [4690900] [17-1346] ***MANDATE RECALLED - SEE ORDER OF 08/29/2018***--[Edited 10/18/2018 by MER] (MER) [Entered: 08/07/2018 11:21 AM]

DATE	PROCEEDINGS
08/29/2018	SUPREME COURT order filed. The application to recall and stay the mandate, presented to Justice Gorsuch and by him referred to the Court, is granted, and the mandate of the United States Court of Appeals for the Eighth circuit in case No. 17-1346 is recalled and stayed pending the timely filed and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this court. Justice Ginsburg, Justice Sotomayor, and Justice Kagan would deny the application. [4699372] [17-1346] (SRD) [Entered: 08/29/2018 11:56 AM]
08/29/2018	CLERK ORDER: Pursuant to the order of the U.S. Supreme Court, dated August 29, 2018, the mandate is hereby recalled and stayed pending the disposition of a petition for a writ of certiorari. [4699383] [17-1346] (SRD) [Entered: 08/29/2018 12:01 PM]
10/15/2018	U.S. Supreme Court Notice of cert filed in the Supreme Court on 10/11/2018, case No. 18-481 [4717214] [17-1346] (MER) [Entered: 10/18/2018 03:39 PM]

DATE	PROCEEDINGS
11/08/2018	RECORD RETURNED - EXHIBITS, Comments: 1 expandable folder of trial exhibits - see attached Exhibit List, *SENT -END OF CASE [4724228]* [17-1346] (JJF) [Entered: 11/08/2018 09:27 AM)

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION
No. 4:11-cv-04121-KES

Argus Leader Media v. United States Department of Agriculture

DATE	DOCKET NUMBER	PROCEEDINGS
08/26/2011	1	COMPLAINT filed by Argus Leader Media. (Attachments: # 1 Ex 1 - 2/1/11 Ellis ltr to Weatherly, # 2 Ex 2 - Undated ltr. from Weatherly to Ellis, # 3 Ex 3 - 2/25/11 ltr from Ellis to USDA)(DJP) (Entered: 08/26/2011)
03/15/2012	13	MOTION to Continue *Motion Deadline As to Exemption 4* by United States Department of Agriculture. (Attachments: # 1 Declaration of Jennifer Weatherly) (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	14	MEMORANDUM in Support re 13 MOTION to Continue *Motion Deadline As to Exemption 4* filed by United States

DATE	DOCKET NUMBER	PROCEEDINGS
		Department of Agriculture. (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	18	MOTION for Summary Judgment by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	19	AFFIDAVIT of Stephanie C. Bengford in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) Modified title on 3/16/2012 (CMS). (Entered: 03/15/2012)
03/15/2012	20	AFFIDAVIT of Susan Modine in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) Modified title on 3/16/2012 (CMS). (Entered: 03/15/2012)
03/15/2012	21	AFFIDAVIT of Andrea Gold in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Attachments: # 1 Exhibit) (Bengford, Stephanie) Modified title and exhibit on

DATE	DOCKET NUMBER	PROCEEDINGS
		3/16/2012 (CMS). (Entered: 03/15/2012)
03/15/2012	22	STATEMENT OF MATERIAL FACTS re 18 Motion for Summary Judgment by Defendant United States Department of Agriculture, Plaintiff Argus Leader Media filed by United States Department of Agriculture, Argus Leader Media. (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	23	MEMORANDUM in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 03/15/2012)
03/16/2012	25	AFFIDAVIT of Jennifer N. Weatherly re 18 MOTION for Summary Judgment. (Attachments: # 1 A: original request, # 2 B: request acknowledgement ltr, # 3 C: FW:FOIA request acknowledgement ltr, # 4 D: initial response, # 5 E: appeal response, # 6 F: Arnson ltr, # 7 G: Weatherly email)(Bengford, Stephanie) (Entered: 03/16/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
04/12/2012	26	ORDER granting 13 Motion to Continue Briefing Deadline as to Exemption 4 for good cause shown. The court will consider Exemption 3 first and then schedule a new deadline regarding Exemption 4, if necessary. Signed by Chief Judge Karen E. Schreier on April 12, 2012. (Schreier, Karen) (Entered: 04/12/2012)
05/23/2012	33	MEMORANDUM in Opposition re 18 MOTION for Summary Judgment filed by Argus Leader Media. (Attachments: # 1 Exhibit A - 7 USC §2018, # 2 Exhibit B - 7 USC §278.1, # 3 Exhibit C - SNAP Application for Stores)(Arneson, Jon) Modified to identify exhibits on 5/24/2012 (CMS). (Entered: 05/23/2012)
05/23/2012	34	STATEMENT OF MATERIAL FACTS re 33 Memorandum in Opposition to Motion by Plaintiff Argus Leader Media filed by Argus Leader Media. (Attachments: # 1 Jon E. Arneson Declaration in Opposition to Defendant's Motion for Summary Judgment, # 2

DATE	DOCKET NUMBER	PROCEEDINGS
		Jonathan Ellis Declaration in Opposition to Defendant's Motion for Summary Judgment) (Arneson, Jon) Modified on 5/24/2012 (CMS). (Entered: 05/23/2012)
06/11/2012	35	REPLY to 23 Memorandum in Support of Motion, 18 Motion for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 06/11/2012)
06/11/2012	36	DECLARATION of Susan Modine re 35 Reply. (Bengford, Stephanie) (Entered: 06/11/2012)
06/11/2012	37	DECLARATION of Jennifer Weatherly re 35 Reply. (Attachments: # 1 Exhibit 1 - Letter dated 08.05.2010, # 2 Exhibit 2 - response dated 08.31.2010)(Bengford, Stephanie) Modified on 6/12/2012 (CMS). (Entered: 06/11/2012)
09/27/2012	38	ORDER denying 12 Motion for Discovery; granting 18 Motion for Summary Judgment. Signed by Chief Judge Karen E.

DATE	DOCKET NUMBER	PROCEEDINGS
		Schreier on 9/27/2012. (KC) (Entered: 09/27/2012)
09/27/2012	39	JUDGMENT in favor of United States Department of Agriculture against Argus Leader Media. Signed by Chief Judge Karen E. Schreier on 9/27/2012. (KC) (Entered: 09/27/2012)
11/20/2012	40	NOTICE OF APPEAL as to 38 Order on Motion for Discovery, Order on Motion for Summary Judgment by Argus Leader Media. (Attachments: # 1 Supplement Form A) (Arneson, Jon) (Entered: 11/20/2012)
11/21/2012	42	USCA Case Number 12-3765 for 40 Notice of Appeal filed by Argus Leader Media. (CMS) (Entered: 11/21/2012)
01/28/2014	44	OPINION of USCA re: reversing and remanding for further proceedings consistent with this opinion as to 40 Notice of Appeal filed by Argus Leader Media (CMS) (Entered: 01/28/2014)
01/28/2014	45	JUDGMENT of USCA reversing and remanding for further proceedings consistent with opinion as to 40 Notice of Appeal

DATE	DOCKET NUMBER	PROCEEDINGS
		filed by Argus Leader Media (CMS) Modified on 1/28/2014 (CMS). (Entered: 01/28/2014)
03/25/2014	46	MANDATE from 8th Circuit COA reversing and remanding the decision of the District Court as to 40 Notice of Appeal filed by Argus Leader Media (TAL) (Entered: 03/27/2014)
01/20/2015	58	MOTION for Summary Judgment by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 01/20/2015)
01/20/2015	59	DECLARATION of Andrea Gold re 58 MOTION for Summary Judgment. (Attachments: # 1 Ex. A - call transcript, # 2 Ex. B - email from FNS, # 3 Ex. C -declaration template, # 4 Ex. D1 - Barnes declaration, # 5 Ex. D2 - Bourne declaration, # 6 Ex. D3 - Buche declaration, # 7 Ex. D4 - Barbier declaration, # 8 Ex. D5 - Gresham declaration, # 9 Ex. D6 - Hays declaration, # 10 Ex. D7 - Champagne declaration, # 11 Ex. D8 - Forman declaration, # 12 Ex. D9 - LeBlanc declaration, # 13 Ex. D10

DATE	DOCKET NUMBER	PROCEEDINGS
		- Macks declaration, # 14 Ex. Dll - Larkin declaration, # 15 Ex. D12 - Snyder declaration, # 16 Ex. D13 - St. Germain declaration, # 17 Ex. D14 - Perret declaration, # 18 Ex. D15 - Zahar declaration, # 19 Ex. E - SNAP redemption chart, # 20 Ex. F FNS literature) (Bengford, Stephanie) (Entered: 01/20/2015)
01/20/2015	60	STATEMENT OF MATERIAL FACTS re 58 Motion for Summary Judgment by Defendant United States Department of Agriculture filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 01/20/2015)
01/20/2015	61	MEMORANDUM in Support re 58 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 01/20/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
02/03/2015	65	SUPPLEMENT by Defendant United States Department of Agriculture re 59 Declaration,,, . (Attachments: # 1 Exhibit Exhibit C - email & declaration template) (Bengford, Stephanie) (Entered: 02/03/2015)
04/01/2015	72	STATEMENT OF *Plaintiff's* MATERIAL FACTS re 58 Motion for Summary Judgment, 60 Statement of Material Facts by Plaintiff Argus Leader Media filed by Argus Leader Media. (Arneson, Jon) (Entered: 04/01/2015)
04/01/2015	73	MEMORANDUM in Opposition re 58 MOTION for Summary Judgment #2 filed by Argus Leader Media. (Attachments: # 1 Exhibit Ex. Order 12600, # 2 Exhibit 7 C.F.R. §1.12, # 3 Exhibit Retailer Notices, # 4 Exhibit Fed.Register "RFI", # 5 Exhibit USDA Press Release, # 6 Exhibit Arneson Declaration, # 7 Exhibit Ellis Declaration)(Arneson, Jon) (Entered: 04/01/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
06/01/2015	77	REPLY to 58 Motion for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 06/01/2015)
06/01/2015	78	DECLARATION of Andrea Gold re 58 MOTION for Summary Judgment (Attachments: # 1 Exhibit A - 78 Fed. Reg. 11,967, # 2 Exhibit B- 7 C.F.R. 271.2, # 3 Exhibit C - Megan Luther FOIA Request)(Bengford, Stephanie) (Entered: 06/01/2015)
06/01/2015	79	RESPONSE to 72 Statement of Material Facts filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 06/01/2015)
09/30/2015	80	ORDER denying 58 Motion for Summary Judgment. Signed by U.S. District Judge Karen E. Schreier on 9/30/15. (DJP) (Entered: 09/30/2015)
04/20/2016	93	MOTION Expedited Motion for Court Order by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 04/20/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
04/20/2016	94	ORDER granting 93 Motion. Defendant has the burden of proof and will put its case-in-chief on first. Signed by U.S. District Judge Karen E. Schreier on April 20, 2016. (Schreier, Karen) (Entered: 04/20/2016)
05/11/2016	95	Pretrial Submissions by Argus Leader Media. (Attachments: # 1 Supplement) (Arneson, Jon) (Entered: 05/11/2016)
05/11/2016	96	Pretrial Submissions by United States Department of Agriculture.(Bengford, Stephanie) (Entered: 05/11/2016)
05/16/2016	99	STIPULATION *as to the Trial* by United States Department of Agriculture (Bengford, Stephanie) (Entered: 05/16/2016)
05/17/2016	101	MOTION for Protective Order by United States Department of Agriculture. (Attachments: # 1 Text of Proposed Order)(Bengford, Stephanie) (Entered: 05/17/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
05/17/2016	102	MEMORANDUM in Support re 101 MOTION for Protective Order filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 05/17/2016)
05/19/2016	103	Protective Order. Signed by U.S. District Judge Karen E. Schreier on 5/19/16. (DJP) (Entered: 05/19/2016)
05/19/2016	105	Pretrial Conference held on 5/19/2016 before U.S. District Judge Karen E. Schreier (Court Reporter Jill Connelly) (MWT) (Entered: 05/19/2016)
05/24/2016		Court Trial began on 5/24/2016 before U.S. District Judge Karen E. Schreier (Court Reporter Jill Connelly) (MWT) (Entered: 05/25/2016)
05/25/2016	111	Court Trial completed on 5/25/2016 before U.S. District Judge Karen E. Schreier (Court Reporter Jill Connelly) (MWT) (Entered: 05/25/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
05/25/2016	112	Exhibit List by Argus Leader Media. Related document: 111 Court Trial - Completed. (MWT) (Entered: 05/25/2016)
05/25/2016	113	Exhibit List by United States Department of Agriculture. Related document: 111 Court Trial - Completed. (MWT) (Entered: 05/25/2016)
06/19/2016	118	PARTIAL TRANSCRIPT of Proceedings re 111 Court Trial - Testimony of Shelly Pierce and Andrea Gold - held on May 24 & 25, 2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/11/2016. Redacted Transcript Deadline set for 7/20/2016. Release of Transcript Restriction set for 9/19/2016. (Connelly, Jill) (Entered: 06/19/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
06/19/2016	119	PARTIAL TRANSCRIPT of Proceedings re 111 Court Trial - Testimony of Andrew Johnstone - held on May 24, 2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/11/2016. Redacted Transcript Deadline set for 7/20/2016. Release of Transcript Restriction set for 9/19/2016. (Connelly, Jill) (Entered: 06/19/2016)
06/19/2016	120	NOTICE of Filing of Official Transcripts re 111 Court Trial - 2 PARTIAL TRANSCRIPTS. The Court Reporter shall manually serve a hard copy of this Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 06/19/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
06/22/2016	121	TRIAL BRIEF *(Post)* by United States Department of Agriculture.(Bengford, Stephanie) (Entered: 06/22/2016)
06/28/2016	122	PARTIAL TRANSCRIPT of Proceedings re 111 Court Trial - Closing Statements - held on 5-25-2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/19/2016. Redacted Transcript Deadline set for 7/29/2016. Release of Transcript Restriction set for 9/27/2016. (Connelly, Jill) Modified on 2/3/2017 to seal per 152 (SLW). (Entered: 06/28/2016)
06/28/2016	123	NOTICE of Filing of Official Transcript re 111 Court Trial - PARTIAL TRANSCRIPT - CLOSING STATEMENTS. The Court Reporter shall manually serve a hard copy of this

DATE	DOCKET NUMBER	PROCEEDINGS
		Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 06/28/2016)
07/20/2016	124	BRIEF by Plaintiff Argus Leader Media *Post-Trial Responsive Brief* (Arneson, Jon) (Entered: 07/20/2016)
07/26/2016	125	REPLY to 124 Brief filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 07/26/2016)
07/28/2016	126	RESPONSE to 125 Reply *Clarifications* filed by Argus Leader Media. (Arneson, Jon) (Entered: 07/28/2016)
11/30/2016	127	MEMORANDUM OPINION AND ORDER Signed by U.S. District Judge Karen E. Schreier on 11/30/16. (SLW) (Entered: 11/30/2016)
11/30/2016	128	JUDGMENT in favor of Argus Leader Media against United States Department of Agriculture. Signed by U.S. District Judge Karen E. Schreier on 11/30/16. (SLW) (Entered: 11/30/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
01/27/2017	138	Emergency MOTION to Intervene, to Stay the Judgment, and for Extension of Time to File Notice of Appeal by Food Marketing Institute. (Fritz, Daniel) Modified on 1/30/2017 (DJP). (Entered: 01/27/2017)
01/27/2017	139	Memorandum in Support re 138 Emergency MOTION to Intervene *to Stay the Judgment and for Extension of Time to File Notice of Appal filed by Food Marketing Institute. (Attachments: # 1 Exhibit 1 (Declaration of Food Marketing Institute), # 2 Exhibit 2 (Declaration of H-E-B Grocery Company, L.P., # 3 Exhibit 3, (Declaration of National Grocers Association) # 4 Exhibit 4 (Declaration of David Mitchell)) (Fritz, Daniel) Modified on 1/30/2017 to add text (DJP). Modified text on 1/30/2017 (SLW). (Entered: 01/27/2017)*
01/30/2017	142	RESPONSE to Motion re 138 Emergency MOTION to Intervene *to Stay the Judgment and for Extension of Time to File Notice of Appeal filed by Argus Leader Media. (Attachments:*

DATE	DOCKET NUMBER	PROCEEDINGS
		# 1 Exhibit FMI declaration, # 2 Exhibit FMI RFI comment, # 3 Exhibit Answer to Interrogatory, # 4 Exhibit Production response, # 5 Exhibit Gold SJ declaration, # 6 Exhibit Larkin SJ declaration, # 7 Exhibit Larking declaration letter, # 8 Exhibit Larkin expert report, # 9 Exhibit FMI report 9-9-14, # 10 Exhibit FMI report 12¬2-14, # 11 Exhibit FMI report 12-16-14)(Arneson, Jon) (Entered: 01/30/2017)
01/30/2017	143	ORDER granting 138 FMIs motion to intervene. The court stays its judgment. FMI is required to post a $20,000 bond. The court also grants FMIs motion for a 15-day extension to file an appeal. Signed by U.S. District Judge Karen E. Schreier on 01/30/2017. (MWT) (Entered: 01/30/2017)
02/03/2017	147	BOND in the amount of $ $20,000 posted by Food Marketing Institute. Receipt #SDX400042442 (SLW) (Entered: 02/03/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
02/07/2017	153	REDACTED Transcript re 122 Transcript. (Connelly, Jill) (Entered: 02/07/2017)
02/10/2017	154	EXPEDITED MOTION to Amend/Correct 103 *Protective Order* by United States Department of Agriculture. (Attachments: # 1 Text of Proposed Order)(Bengford, Stephanie) Modified on 2/13/2017 to add link and language (DJP). (Entered: 02/10/2017)
02/10/2017	155	MEMORANDUM in Support re 154 MOTION to Amend/Correct *Protective Order* filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 02/10/2017)
02/13/2017	156	AMENDED PROTECTIVE ORDER granting 154 Motion to Amend/Correct. Signed by U.S. District Judge Karen E. Schreier on 2/13/17. (SLW) (Entered: 02/13/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
02/14/2017	157	NOTICE OF APPEAL as to 128 Judgment by Food Marketing Institute. (paid $505 Appellate Filing fee; receipt number 0869-2449298) (Fritz, Daniel) (Entered: 02/14/2017)
02/15/2017	160	USCA Case Number for 157 Notice of Appeal filed by Food Marketing Institute. USCA Case Number: 17-1346. (TAL) (Additional attachment(s) added on 2/15/2017: # 1 Briefing Schedule) (TAL). (Entered: 02/15/2017)
06/18/2017	184	TRANSCRIPT of Proceedings re 105 Pretrial Conference held on May 19, 2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/10/2017. Redacted Transcript Deadline set for 7/19/2017. Release of Transcript Restriction

DATE	DOCKET NUMBER	PROCEEDINGS
		set for 9/18/2017. (Connelly, Jill) (Entered: 06/18/2017)
06/18/2017	185	TRANSCRIPT of Proceedings re 111 Court Trial held on May 24&25, 2016 before Judge Karen E. Schreier. Volume I of II. (Volume II is attached) Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/10/2017. Redacted Transcript Deadline set for 7/19/2017. Release of Transcript Restriction set for 9/18/2017. (Attachments: #1 Volume II of II) (Connelly, Jill) (Entered: 06/18/2017)
06/18/2017	186	REDACTED Transcript re 185 Transcript, Court Trial, Vol. II of II, held on May 25, 2016. (Connelly, Jill) (Entered 06/18/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
06/18/2017	187	SEALED PARTIAL TRANSCRIPT of Proceedings re 111 Sealed rebuttal testimony of Gwen Forman during the Court Trial held on 5-25-2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/10/2017. Redacted Transcript Deadline set for 7/19/2017. Release of Transcript Restriction set for 9/18/2017. (Connelly, Jill) (Entered: 06/18/2017)
06/18/2017	188	NOTICE of Filing of Official Transcript re 111 Court Trial - Completed, 105 Pretrial Conference. The Court Reporter shall manually serve a hard copy of this Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 06/18/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
06/20/2017	190	MOTION Access to Sealed Doc 187 and Unredacted Doc 185 by Food Marketing Institute. (Fritz, Daniel) (Entered: 06/20/2017)
07/07/2017	191	ORDER granting 190 Motion of FMI for access to sealed partial transcript of proceedings (docket 187) and unredacted transcript of proceedings (docket 185), for good cause shown and no objections filed by other parties. Signed by U.S. District Judge Karen E. Schreier on July 7, 2017. (Schreier, Karen) (Entered: 07/07/2017)
05/08/2018	197	OPINION of USCA as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 05/08/2018)
05/08/2018	198	JUDGMENT of USCA affirming the district court judgment as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 05/08/2018)
06/04/2018	199	ORDER of USCA remanding to the district court with instructions to determine the

DATE	DOCKET NUMBER	PROCEEDINGS
		availability of attorney's fees pursuant to 5 U.S.C. § 552, and to enter judgment accordingly as to 157 Notice of Appeal filed by Food Marketing Institute. (SAC) (Entered: 06/04/2018)
07/13/2018	200	ORDER of USCA denying petitions for rehearing enbanc and rehearing by panel as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 07/13/2018)
08/07/2018	201	ORDER of USCA denying motion to stay mandate as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 08/07/2018)
08/07/2018	202	(RECALLED) MANDATE from 8th Circuit COA Affirming the decision of the District Court as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) Modified on 8/29/2018 (TAL). (Entered: 08/07/2018)

DATE	DOCKET NUMBER	PROCEEDINGS
08/29/2018	203	ORDER of Supreme Court granting application to recall and stay the mandate as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 08/29/2018)
08/29/2018	204	ORDER of USCA recalling mandate as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 08/29/2018)
10/18/2018	205	LETTER from USCA regarding Writ Of Certiorari re 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 10/19/2018)
11/13/2018	206	Appeal Record Returned: Jury Trial exhibits returned to Sioux Falls Clerk's Vault. (SLW) (Entered: 11/13/2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121

(Filed 08/26/11)

ARGUS LEADER MEDIA, dba *Argus Leader*,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Defendant.

COMPLAINT

Plaintiff, Argus Leader Media [*Argus Leader*], for its Complaint, states as follows:

JURISDICTION AND VENUE

1. This action arises under and pursuant to the Freedom of Information Act, 5 U.S.C. §552, to order the production of agency records concerning the identity of businesses that receive federal food stamp revenue under the auspices of the United States Department of

Agriculture [USDA]. These records have been improperly held from the plaintiff.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. §552 (a)(4)(B).

3. Venue is proper in this district under 5 U.S.C. §552 (a)(4)(B).

THE PARTIES

4. *Argus Leader* is a newspaper published in Sioux Falls, South Dakota, and has a principal place of business at 200 South Minnesota Avenue, Sioux Falls, South Dakota.

5. Defendant is the Secretary of the Department of Agriculture, the Department of Agriculture being the agency withholding the record sought under the Freedom of Information Act.

FACTS

6. By letter dated February 1, 2011, Plaintiff requested access to data stored on USDA's Food Nutrition Service's STARS database. The requested records pertaining to stores [vendors] in the United States that redeemed food stamps from 2005 through 2010 were: a) store identifiers [unique ID number]; store names; store addresses; store types; annual redemption amounts

or EBT [electronic benefit transfer] sales figures for each store. A copy of this letter is attached hereto and incorporated herein as Exhibit 1.

7. By undated letter received February 17, 2011, Plaintiff agreed to release store names and addresses, but furnished an incomplete list. The Defendant's letter went on to deny Plaintiff access to all other requested information on the ground that it was exempt from disclosure under 5 U.S.C. §552 (b)(3) and (b)(4). A copy of this letter is attached hereto and incorporated herein as Exhibit 2.

8. By letter dated February 25, 2011, Plaintiff appealed the denial of this request. A copy of this letter is attached hereto and incorporated herein as Exhibit 3.

9. An official agency response to the letter of appeal has not been received from the Department of Agriculture or its officers or attorneys.

10. The USDA's "unofficial" position was sent by email on July, 2011, and contained the following claims:

> [The *Argus Leader*] requested for Store Identifier and Store Type which we withheld. Store type is one of the identifiers designated to each authorized retailer by FNS. CFR 278.1(3)(iv) indicates that the SSNs and related records that are obtained or maintained by authorized persons are confidential

> . . . . The term "related record" means any record, list, or compilation that indicates, directly or indirectly, the identity of any individual with respect to whom a request for a SSN is maintained. Store identifiers or unique identification numbers would be included in the category of "related records."
>
> [The *Argus Leader*] also requested for EBT redemption data which we withheld. Again from CFR 278.1 we are not allowed to release this information unless it is for the purpose directly connected with the administration and enforcement of the Food Stamp Act. . . .

11. Plaintiff has a right of access to the requested information under 5 U.S.C. 552 (a)(3) and there is no legal basis for Defendant's denial of such access.

WHEREFORE, Plaintiff prays:

1. That this Court order Defendant to provide immediate access to the requested documents and information;

2. Award Plaintiff its costs and reasonable attorney fees in this action as provided under 5 U.S.C. §552(a)(4)(E);

3. Grant such other relief as the Court may deem just and proper.

DATED this 26th[th] day of August, 2011.

/s/ Jon E. Arneson

JON E. ARNESON, SD. Bar #45
123 South Main Avenue, Ste. 202
Sioux Falls, South Dakota 57104
Telephone: (605) 335-0083
Facsimile: (605) 335-0083
Attorney for Plaintiff

EXHIBIT 1

Argus Leader
200 S. Minnesota Avenue
PO Box 5034
Sioux Falls, SD 57117-5034
(605) 331-2300
Fax: (605) 331-2294

Feb. 1, 2011

Jennifer Weatherly
FNS FOIA Officer
USDA Food and Nutrition Service
3010 Park Center Dr.
Alexandria, VA 22302

Dear Ms. Weatherly:

This is a request under the Freedom of Information Act.

Please send me the following data from the FNS STARS database for fiscal years 2005 through 2010:

- Store identifier, or unique ID number
- Store name
- Store address
- Store type
- The yearly redemption amounts, or EBT sales figures, for each store.

I am a member of the media and ask that you waive all fees for this request because disclosure of this information is in the public interest. If you decide to charge fees, please contact me first.

If you deny my request in whole or in part, I ask that you cite the specific exemptions under FOIA that you used to justify your decision.

Thank you for your help in this matter. Please feel free to contact me with any questions.

Sincerely,

Jonathan Ellis
Argus Leader
605-575-3629
JonEllis@ArgusLeader.com

EXHIBIT 2

USDA

**United States
Department of
Agriculture**

Food and
Nutrition
Service

3101 Park Center Dr
Alexandria, VA
22302-1500

Mr. Jonathan Ellis
Argus Leader
200 S. Minnesota Avenue
PO Box 5034
Sioux Falls, SD 57117-5034

Dear Mr. Ellis:

This is in response to the Freedom of Information Act (FOIA) request to this office for the following information:

Data from the FNS STARS database for fiscal years 2005 through 2010:

- Store identifier, or unique ID number
- Store name
- Store address

- Store type
- The yearly redemption amounts, or EBT sales figures, for each store.

In response to your request, we are releasing the store names and addresses during the period you requested. The Food and Nutrition Act at 7 U.S.C. 2018 (9)(c) and Title 7, Part 278 of Federal regulations at 278.1 (q) are specific with regard to information sharing. Therefore, all other information is being withheld under 5 U.S.C. 552 (b)(3) and (b)(4).

If you are dissatisfied with our response to your FOIA request, you may appeal by writing to the Administrator, Food and Nutrition Service at 3101 Park Center Drive, Alexandria, VA 22302 or by email to FOIA@fns.usda.gov within 45 days from the date of this letter. The phrase "FOIA APPEAL" should be placed in capital letters on the front of the envelope or in the subject of the email containing the appeal.

Sincerely,

/s/ Jennifer Weatherly

Jennifer Weatherly
FNS FOIA Officer
USDA Food and Nutrition Service

AN EQUAL OPPORTUNITY EMPLOYER

EXHIBIT 3

Argus Leader
200 S. Minnesota Avenue
PO Box 5034
Sioux Falls, SD 57117-5034
(605) 331-2300
Fax: (605) 331-2294

Feb. 25, 2011

Administrator
USDA Food and Nutrition Serv
3010 Park Center Dr.
Alexandria, VA 22302

RE: FOIA APPEAL

Dear Sir or Madam:

This is an appeal of a Freedom of Information Act request that was denied on Feb. 17, 2011.

We requested the following data from the FNS STARS database for fiscal years 2005 through 2010:

- Store identifier, or unique ID number
- Store name
- Store address
- Store type
- The yearly redemption amounts, or EBT sales figures, for each store.

Your office provided only a partial, incomplete list of the store names and addresses. In addition, your office wrongly denied releasing the other information based on a misreading of the Food and Nutrition Act, 7 U.S.C. 2018 (9)(c) and Title 7, Part 278 of Federal regulations at 278.1 (q). Based upon this, your office inappropriately applied FOIA exemptions (b)(3) and (b)(4) in denying the request for public information.

FOIA exemption (b)(3) applies to information exempt from disclosure by statute. The Food and Nutrition Act explicitly exempts from disclosure "relevant income and sales tax filing documents." No part of our denied request included tax filings, or for that matter, information that would have been included in tax filings, which is information submitted by businesses when they apply to participate in the Supplemental Nutrition Assistance Program.

FOIA exemption (b4) relates specifically to trade secrets and financial information obtained from businesses. Businesses that apply to participate in the Supplemental Nutrition Assistance Program are required to submit an array of information, including actual or expected gross sales. The *Argus Leader's* FOIA request did not ask for gross sales. Instead, the request asked for the amounts that each business received from taxpayers during the calendar years 2005 – 2010 by participating in the SNAP program. That is not information provided by the business; it is public information kept by the department.

Similarly, store identifiers or unique ID numbers and store types are not information provided by businesses, but instead it is information created by the department. Title 7, Part 278 at 278.1 (q) relates

specifically to the "Use and disclosure of information provided by firms." None of the information your department denied in our FOIA request was provided by a business.

The department routinely releases similar information in other programs. For example, the amounts farmers receive in agriculture subsidies are publicly available. It should be no different for businesses that participate in the Supplemental Nutrition Assistance Program.

Taxpayers have a right to know who receives their money and how much they get for providing services on behalf of the government. The release of this information is clearly in the public's interest.

We look forward to the release of the information we requested in this appeal. In addition, we ask that you waive any fees because disclosure is in the public's interest.

Thank you for your help in this matter. Please feel free to contact me with any questions.

Sincerely,

Jonathan Ellis
Argus Leader
605-575-3629
JonEllis@ArgusLeader.com

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant.

DECLARATION OF SUSAN MODINE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Susan Modine, declare as follows:

1. I am a Program Analyst within the Retailer Operations Branch of the Benefit Redemption Division, Food and Nutrition Service (FNS), United States Department of Agriculture. I am responsible for providing technical assistance on retailer management/tracking systems; assisting national, regional, and field office staff with data analysis and

reporting; researching data-related issues; evaluating the administration and operation of programs; and assisting in resolution of issues impacting the Supplemental Nutrition Assistance Program integrity. I have served in this position since December 2008.

* * *

9. SNAP recipients electronically receive SNAP benefits on an EBT card, which operates like a debit card, to buy eligible food at stores authorized by the Food and Nutrition Service. In order to complete a transaction, the customer swipes the card in a point-of-sale device (POS) and enters a four digit personal identification number (PIN). The store clerk enters the exact amount of the purchase on the POS device. This amount is deducted from the household's EBT SNAP account and it is credited within two banking days to the retailer's bank account. This credit to the retailer's bank account is what we refer to as redemptions.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated: 3/14/12

/s/ Susan Modine

Susan Modine
Program Analyst
Retailer Operations Branch of the Benefit Redemption Division
Food and Nutrition Service
United States Department of Agriculture

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DEFENDANT'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The defendant, by and through its attorneys, United States Attorney Brendan V. Johnson and Assistant United States Attorney Stephanie C. Bengford, hereby submits this statement of material facts in support of its motion for summary judgment.

* * *

90. Participating retailers receive their point-of-sale (POS) device from either the state's EBT vendor or from a third party processor. Gold Decl. ¶19.

91. State provided EBT POS equipment processes only SNAP and may process state cash programs, as well [e.g. Temporary Assistance for Needy Families (TANF)]. Gold Decl. ¶19.

92. Third party POS equipment also processes commercial debit and credit card transactions. Gold Decl. ¶19.

93. There are three primary EBT vendors nationally that are under contract with each state to handle SNAP EBT issuance. Gold Decl. ¶20.

* * *

96. State EBT vendors handle and track the client SNAP benefit accounts, process the SNAP EBT transactions and facilitate payments to the participating retail firms. Gold Decl. ¶20.

* * *

100. SNAP redemption data is reviewed to monitor compliance and excessive redemptions may be indicative of violations and a reason for a retail store to be sanctioned. Gold Decl. ¶21.

* * *

Dated this 15th day of March, 2012.

BRENDAN V. JOHNSON
United States Attorney

/s/ Stephanie Bengford

STEPHANIE C. BENGFORD
Assistant U.S. Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2341
Fax: 605.330.4402
Stephanie.bengford@usdoj.gov

CERTIFICATE OF SERVICE

I, Stephanie C. Bengford, do hereby certify that on March 15, 2012, I caused copies of the foregoing to be served upon the following:

)

Jon E. Arneson

- ○ US mail
- ○ FedEx
- • ECF
- ○ hand delivered
- ○ faxed

/s/ Stephanie Bengford

Stephanie C. Bengford

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DECLARATION OF JENNIFER N. WEATHERLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Jennifer N. Weatherly, declare as follows:

1. I am the Freedom of Information Act (FOIA) officer for the Food and Nutrition Service (FNS), which is an agency of the United States Department of Agriculture (USDA). I have served in this position since November 9, 2009.

2. In my capacity as FOIA officer, my responsibilities include managing all FOIA requests made to FNS under the FOIA, 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. I am responsible for ensuring that all FOIA and Privacy Act requests made to FNS are processed appropriately. My duties include initiating searches relevant to such requests and determining whether records or information must be disclosed or withheld.

* * *

Background

* * *

5. Benefit Redemption Division (BRD), a component within FNS, is responsible for all aspects of retailer management and operations for the Supplemental Nutrition Assistance Program (SNAP). In addition, BRD is responsible for the Electronic Benefit Transfer (EBT) system used by recipients through retailers. BRD ensures that only legitimate retailers, who offer a variety of food items, participate in SNAP and that those stores not in compliance with regulations and policies are sanctioned appropriately. BRD also ensures that the EBT

system is responsive to the needs of clients, state, and federal government.

6. The information at issue in plaintiff's request is maintained within an information technology system overseen by BRD. This system is referred to as the Store Tracking and Redemption System (STARS). The STARS system consists of personal information from owners and officers of stores and other entities currently participating in SNAP, as well as those owners and officers who have previously participated in the program. The individual paper records (i.e., applications for authorization) are located in FNS field offices. This database also maintains, but is not limited to, the following business information: corporation name and address, employer identification number (EIN), and financial data (i.e., food sales, gross sales, and SNAP redemption data) relative to each entity that applied and/or was authorized to accept program benefits.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated: March 14, 2012

/s/ Jennifer Weatherly
Jennifer Weatherly
FOIA Officer
USDA, Food and Nutrition Service

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DECLARATION OF ANDREA GOLD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Andrea Gold, declare as follows:

1. I am the Benefit Redemption Division Director for the Supplemental Nutrition Assistance Program (SNAP). SNAP is part of the Food and Nutrition Service (FNS), an agency of the United States Department of Agriculture (USDA). I have served in this position since December 2010.

2. In my current position, I am responsible for national SNAP retailer management policies and oversight activities. I am also responsible for national SNAP benefit issuance policies and Electronic Benefit Transfer (EBT) related activities.

* * *

8. The FNS number is a unique retailer identification number. Without a valid FNS number, a SNAP payment cannot be authorized. The FNS number is also used to track store redemption of SNAP benefits. These items are explained in further detail below.

* * *

19. Participating retailers receive their point-of-sale (POS) device from either the state's EBT vendor or from a third party processor. State provided EBT POS equipment processes only SNAP and may process state cash programs, as well [e.g. Temporary Assistance for Needy Families (TANF)]. Third party POS equipment also processes commercial debit and credit card transactions.

20. There are three primary EBT vendors nationally that are under contract with each state to handle SNAP EBT issuance. The EBT vendors may sub-contract the management of retailer POS. In other words, the primary

EBT vendors may contract out to subcontractors the ability to provide the point of sale devices to authorized retail firms. State SNAP EBT vendors or state card issuers provide the EBT cards to participating SNAP clients. State EBT vendors handle and track the client SNAP benefit accounts, process the SNAP EBT transactions and facilitate payments to the participating retail firms. The EBT vendors send FNS files of all SNAP transactions by FNS number. Aggregated SNAP redemptions for each retail firm are loaded into our STARS database. This becomes the agency's official record of SNAP redemptions by retail firm. Participating retail firms receive payment for SNAP transactions via direct deposits into the bank account of record.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated March 15, 2012.

/s/ Andrea Gold
Andrea Gold
Benefit Redemption Division Director
Supplemental Nutrition
Assistance Program
United States Department of Agriculture

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 01/20/15)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DECLARATION OF ANDREA GOLD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Andrea Gold, declare as follows:

1. I am the Retailer Policy and Management (formerly Benefit Redemption) Division Director for the Supplemental Nutrition Assistance Program (SNAP). SNAP is part of the Food and Nutrition Service (FNS), an agency of the United States Department of Agriculture

(USDA). I have served in this position since December 2010.

2. In my current position, I am responsible for national SNAP retailer management policies and oversight activities. I am also responsible for national SNAP benefit issuance policies and Electronic Benefit Transfer (EBT) related activities.

* * *

21. Further, FNS considered whether the redemption information at issue meets the requirement of "obtained from a person." FNS understands that "person" has been broadly defined to include individuals and businesses. In the simplest terms, SNAP redemption information is generated when the SNAP client swipes his or her Electronic Benefits Transfer (EBT) card at the SNAP retail food store and that information is transmitted to the State-contracted, private EBT processor, which then transmits the information to FNS. In accordance with 7 CFR 274.8(a)(3), the State-contracted, private EBT processor is responsible for sending to FNS the files of all SNAP transactions. There are three primary EBT processors nationally that are under contract with each state: Xerox, FIS, and JP

Morgan Chase. *See* SNAP REDEMPTION CHART, **Exhibit E**. Retailers may choose to enter into a contract with a private third-party processor, which acts as an agent of the retailer in transmitting SNAP transaction data to the EBT processor and in transmitting SNAP funds to the retailer's bank account. Third-party processors are private, commercial entities that provide credit/debit/EBT card processing services to retailers.

22. In order to participate in SNAP a retailer must apply to FNS. If eligible, FNS will authorize the retailer. All SNAP households are issued EBT cards in order to purchase food at retailers; therefore, in order to allow SNAP households to use EBT cards to purchase food at their stores, authorized retailers must be able to accept EBT transactions. In order to accept EBT transactions, an authorized retailer oftentimes enters into a contract with a third-party processor, a private, commercial credit/debit/ EBT card processor. Third-party processors provide Point of Sale (POS) devices to retailers, in addition to routing SNAP transactions to the appropriate State-contracted, private EBT processor for approval and transmitting SNAP funds to the retailer's bank account. If a retailer does not want to accept credit/debit cards it

may instead opt to contract directly with the EBT processor for POS and EBT services. SNAP redemption data is generated only when an approved SNAP transaction occurs at the authorized retailer's POS device. An EBT card is swiped at a POS terminal, and the completed electronic transaction is transmitted to the EBT processor, either via the retailer's third-party processor or directly from the retailer. The EBT processor then verifies relevant information, such as whether the EBT card and the Personal Identification Number (PIN) used are valid and whether there are sufficient funds in the SNAP household's account, before approving the transaction and adjusting the SNAP household's account on the household's EBT card to reflect the transaction. Each day the EBT processor reconciles and tallies the total amount of SNAP benefits accepted by retailers. The EBT processor credits that amount to the bank accounts of each third-party processor and directly connected retailer through the Automated Clearing House (ACH) network. The EBT processor subsequently submits a request to the Federal Reserve Bank where each State has a funded letter-of-credit for reimbursement for those funds through this same ACH

process or by direct wire. Each day the third-party processor also calculates the amount owed to each of its retailers for all credit, debit and EBT transactions and uses the ACH process to credit the retailer's bank account. Electronic EBT transaction approval requests sent to the EBT processor, as described earlier, contain dozens of data fields, including date, time, transaction type and dollar amount. It is the dollar amount of the transaction which is referred to as SNAP redemption amount and it is these individual dollar amounts that are compiled by the EBT processor and transmitted into the STARS database on a weekly basis. The EBT processor records all of this data for both the SNAP household and the retailer. In accordance with 7 CFR 274.8(a)(3), the EBT processor transmits a subset of this data to FNS, where it is aggregated, tracked, and analyzed in order to ensure program integrity and to investigate and sanction SNAP retailers who commit fraud. For example, knowledge of whether a store is redeeming assists FNS in ensuring that stores that have been closed or sold are removed from the Program (i.e. non-redeeming stores are periodically contacted to determine their status and purged if closed or under new ownership). This also allows FNS to provide

the most up to date list of operating SNAP authorized locations to the public via the SNAP Retailer Locator. Additionally, this knowledge allows FNS to focus staff resources for store reauthorization and compliance monitoring activities on stores that are open and operational.

23. As part of the SNAP retailer authorization process, the retailer is advised that SNAP redemption data will be recorded the by the EBT processors and shared with FNS. This is noted in SNAP regulations at 7 CFR 274.8(a)(3), which requires that the EBT processor record SNAP redemption data and transmit that information to FNS, and in FNS literature that newly-authorized SNAP retailers receive from FNS. **Exhibit F** (FNS literature). Furthermore, this requirement to send SNAP redemption data to FNS is reiterated in contracts between the EBT processor and State. A typical contract between the EBT processor and State includes the following language:

> The Contractor will provide batch interface files required by the U.S. Department of Agriculture, Food & Nutrition Service (FNS), including at a minimum:

• Account Management Agent (AMA), daily batch update

Each business day, the Contractor must provide data necessary to support increases/decreases to the project's Treasury Department's Automated Standard Application for Payments (ASAP) account balance to the Federal Reserve Bank of Richmond. The Federal Reserve Bank will serve as the Account Management Agent (AMA) for the FNS Supplemental Nutrition Assistance Program EBT benefit account. The AMA will interface with the ASAP account, and will establish ASAP account funding limits for the State for SNAP EBT activity. Consequently, it will be necessary for the Contractor to interface with the AMA and provide the necessary data.

• Store Tracking and Redemptions Subsystem (STARS), weekly file transmission

On a weekly basis, the Contractor shall provide detailed net daily SNAP redemption data by retailer identification number to the Store Tracking and Redemptions Subsystem (STARS) system, the FNS SNAP redemption database, through the Benefit Redemption Systems Branch (BRSB) in Minneapolis. STARS provides data to FNS field offices, area offices, regional offices and the national office to monitor compliance with regulations by retailers, Federal Reserve Bank member institutions, and EBT contractors that participate in the Supplemental Nutrition Assistance Program.

Therefore, a retailer who refuses to have its SNAP redemption information submitted to FNS would not be able to accept EBT cards and would be unable to participate as a SNAP retailer. In summary, redemption data is generated at the store-level, the generation and submission of this data has been authorized by the retailer, and the transmission of this data is required by FNS.

24. Transmission files from EBT processors to STARS are received and processed by the FNS SNAP STARS contractor. Each State-contracted, private EBT processor electronically sends one file per State that contains the daily total SNAP redemption data for the State's EBT cards that were used at each store. STARS does not receive individual transaction data. Once each transmission file is received, it is then posted to STARS as redemption data for each SNAP retailer. Once all the files from each State's EBT processor for the entire month are received by the FNS SNAP STARS contractor, the Average Monthly Redemptions is calculated in STARS for each SNAP retailer. This is the monthly average of the total redemptions for the last 12 full months for each SNAP retailer and this monthly average is used to

calculate the appropriate civil penalties for SNAP retailers who commit fraud. For purposes of calculating the end-of-the-year Average Monthly Redemptions, STARS aggregates the January through December monthly SNAP redemption amounts for each retailer to produce the yearly SNAP redemption data for each SNAP retailer.

* * *

26. Upon review of the responses provided the Agency has determined that FOIA exemption 4 applies relative to the release of the 2005-2010 SNAP redemptions. The Agency therefore declined to release retailer redemption information for the period requested by Argus. Based on the comments received from the RFI and additional information submitted by retailers and trade groups, the Agency has determined that annual store-level SNAP redemption information is confidential or privileged commercial or financial information that is obtained from a person.

27. In addition, the Agency has had a long-standing policy regarding treatment of this data as confidential under 7 C.F.R. § 278.1(q). As retailers participating during the period for which data has been requested did

so under the expectation that such data would be protected, and because they are unable to opt out retrospectively, this data will not be released.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated January 20, 2015.

/s/ Andrea Gold
Andrea Gold
Retailer Policy and Management
Division Director
Supplemental Nutrition Assistance
Program
Food and Nutrition Service
United States Department of Agriculture

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civ. 11-4121

ARGUS LEADER MEDIA, dba ARGUS LEADER,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Excerpts from Transcript of Court Trial held May 24-25, 2016, before the Honorable Karen E. Schreier, U.S. District Court Judge, at the U.S. District Courthouse in Sioux Falls, South Dakota

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APPEARANCES:

MR. JON E. ARNESON, Attorney at Law, 123 S. Main Avenue, Suite 202, Sioux Falls, South Dakota 57104, appearing on behalf of the Plaintiff.

MS. STEPHANIE C. BENGFORD, U.S. Attorney's Office, P.O. Box 2638, Sioux Falls, South Dakota 57101-2638, appearing on behalf of the Defendant.

MR. DAVID K. GASTON and MS. CHU-YUAN HWANG, U.S. Department of Agriculture, 1400 Independence Avenue, S.W., Room 3311, Washington, DC 20250, appearing on behalf of the Defendant.

* * *

[10] SHELLY PIERCE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. HWANG: Good morning, Miss Pierce. Miss Pierce, can you please state your full name for the record.

MS. PIERCE: Shelly Ann Pierce.

* * *

[11] MS. HWANG: And where do you work, Miss Pierce?

MS. PIERCE: At the United States Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program.

* * *

MS. HWANG: Thank you. What is your position at the United States Department of Agriculture, USDA; Food and Nutrition Service, FNS; Supplemental Nutrition Assistance Program, SNAP?

MS. PIERCE: I am the Branch Chief for the Retailer Administration Branch.

* * *

MS. HWANG: What are your job responsibilities in that position?

MS. PIERCE: My staff is responsible for the systems and data used as part of SNAP Retailer Management.

MS. HWANG: And what are your job responsibilities -- I'm sorry.

So what are the systems that are used in Retailer Management, Miss Pierce?

[12] MS. PIERCE: The Store Tracking and Redemption System, or STARS; the Anti-Fraud Locator using EBT Retailer Transactions, or ALERT; the Online

Store Application; the Online Reauthorization Application; and the SNAP Retailer Locator.

* * *

[13] MS. HWANG: To your knowledge, what is the information at dispute in this current lawsuit brought by Argus Leader?

MS. PIERCE: SNAP retailer redemption data.

MS. HWANG: What is the level of SNAP redemption data that Argus has requested?

MS. PIERCE: Individual retailer redemptions.

MS. HWANG: Do you recall, is there a time frame to Argus Leader's request?

MS. PIERCE: January of 2005 through December of 2010.

MS. HWANG: And how would you describe SNAP redemption information?

MS. PIERCE: It's the net amount redeemed at each retailer location on a particular day.

MS. HWANG: When you say "redeemed," what do you mean?

MS. PIERCE: The amount of SNAP benefits that were transacted at that store.

[14] MS. HWANG: Thank you. Where is such information located at FNS?

MS. PIERCE: We load it into the STARS System.

* * *

MS. HWANG: Your Honor, may I approach the witness with Government's Exhibit 201.

THE COURT: Yes. * * *

* * *

MS. HWANG: Miss Pierce, can you please confirm that I have handed you two documents?

MS. PIERCE: That's correct.

MS. HWANG: And can you confirm that these two documents are identical except for the exhibit number?

MS. PIERCE: That's correct.

MS. HWANG: So I'll ask that you focus on the one without the exhibit number, and you can mark on that as we go along.

Do you recognize this document, Miss Pierce?

MS. PIERCE: Yes.

MS. HWANG: What is this document?

MS. PIERCE: It is a flow chart showing how SNAP transaction [15] and redemption data flow through the system and showing how retailers are paid.

MS. HWANG: Please help me understand how SNAP redemption information, which we were just talking about, gets to the STARS System.

Looking at the exhibit in front of you, can you explain how SNAP redemption information flows into STARS, starting with the SNAP client household swiping his EBT card?

MS. PIERCE: Sure. The SNAP client household would swipe their EBT, or electronic benefits transfer, card at the point-of-sale device at a retailer location. They would enter their four-digit personal identification number, and the retailer clerk would enter the total amount of the purchase.

Most retailers contract with a third party, we call them third-party processors, to provide their point-of-sale equipment and provide transaction processing services to them.

So that entity would pass the information along to the EBT processor, who would validate that the retailer is authorized to participate in the SNAP Program, that the four-digit PIN entered by the client was correct, and that there were enough benefits in the client's account to cover the transaction.

[16] The EBT processor would then send a response through the third-party processor back to the retailer indicating whether the transaction was approved or denied.

MS. HWANG: Thank you. So let's unpack that a little. Do you see the third-party processor on this flow chart?

MS. PIERCE: No.

MS. HWANG: Could you please draw in where the third-party processor would fit on the chart? Do you mind showing the Court where you just drew?

MS. PIERCE: Between the retailer and the EBT processor.

THE COURT: We have an overhead camera. If she puts it down there, then I can see it. There should be a mark on the desk somewhere there. It's kind of in front of the screen.

MS. HWANG: Miss Pierce, does the retailer get to pick its third-party processor?

MS. PIERCE: Yes.

MS. HWANG: And is the Federal Government a party to that contract?

MS. PIERCE: No.

MS. HWANG: Based off of your experience working in the SNAP retailer administration branch, do you know if there are more than ten third-party processors or fewer than ten [17] third-party processors?

MS. PIERCE: More than ten.

MS. HWANG: Can you name some examples of a third-party processor?

MS. PIERCE: First Data, Vantiv, Worldpay.

MS. HWANG: To your knowledge, what types of entities are third-party processors?

MS. PIERCE: Commercial entities.

MS. HWANG: You had also mentioned EBT processor. Who has the contract with the EBT processor?

MS. PIERCE: The state.

MS. HWANG: Does the state get to pick their EBT processor?

MS. PIERCE: Yes.

MS. HWANG: Is the Federal Government a party to that contract?

MS. PIERCE: No.

MS. HWANG: To your knowledge, how many EBT processors are there nationwide?

MS. PIERCE: Currently there are four.

MS. HWANG: Can you name the four EBT processors?

MS. PIERCE: Xerox, FIS, JPMorgan Chase, and Solutran.

MS. HWANG: I don't see Solutran on the EBT flow chart that we're looking at right now. Is there a reason?

MS. PIERCE: They are relatively new. They are taking on their first state right now.

[18] MS. HWANG: To your knowledge, what types of entities are EBT processors?

MS. PIERCE: Commercial entities.

MS. HWANG: So can you describe, looking back again at the flow chart, how the EBT processor sends information to FNS?

MS. PIERCE: They send two files to us. One is sent to the ALERT System and contains the detailed transactions that occurred at retailers in each state. They also send a file with the daily SNAP redemption totals for each retail location.

MS. HWANG: And can you describe what the STARS System is used for?

MS. PIERCE: It's used for managing SNAP retailer participation.

MS. HWANG: When you say "managing SNAP retailer participation," what do you mean?

MS. PIERCE: It receives information from our Online Application that reflects everything the retailer filled out in their application. It allows our contractor to indicate whether or not documents have been received as part of the application process.

It provides the ability to order a visit for a store and records the result of that visit, and records any case that may be opened against a retailer and the [19] results of those cases.

MS. HWANG: And does FNS use STARS for the purposes of paying SNAP retailers?

MS. PIERCE: No.

MS. HWANG: Does the EBT processor send SNAP information to any other FNS systems, other than STARS?

MS. PIERCE: No.

MS. HWANG: I think you previously mentioned ALERT. Is that correct?

MS. PIERCE: Yes.

MS. HWANG: So FNS also -- or, rather, the EBT processor also sends SNAP information to ALERT?

MS. PIERCE: Transaction data, yes.

MS. HWANG: I see. And what does ALERT stand for again?

MS. PIERCE: Anti-Fraud Locator using EBT Retailer Transactions.

MS. HWANG: And how is the information in ALERT different from the information in STARS?

MS. PIERCE: The information in ALERT is each individual transaction that occurred at any retailer location.

It would include information, such as the client's card number, the amount of the transaction, whether it was approved or denied, and whether it was swiped or the card number was entered manually.

MS. HWANG: And can you explain for me what the ALERT System [20] is used for?

MS. PIERCE: Fraud detection.

MS. HWANG: And does FNS use ALERT for purposes of paying SNAP retailers?

MS. PIERCE: No.

MS. HWANG: Other than ALERT and STARS, does the EBT processor send SNAP transaction or redemption information to any other FNS systems?

MS. PIERCE: No.

MS. HWANG: Does FNS receive store-level SNAP redemption data in any other way besides from the EBT processor?

MS. PIERCE: No.

MS. HWANG: Thank you for explaining how SNAP redemption flows to FNS.

Can we take a look back at the SNAP flow chart.

Can you please explain how the retailer's bank receives payment for SNAP transactions?

MS. PIERCE: Sure. The EBT processor each day will send an Automated Clearinghouse, or ACH, file to provide

payment to either the bank accounts of the third-party processors or directly to the retailer's bank account, if it's a retailer that has a direct relationship with them.

MS. HWANG: Great. And is there a difference between the information that the EBT processor puts in the ACH file and the SNAP redemption information that goes to STARS?

[21] MS. PIERCE: Yes.

MS. HWANG: How is the information in the ACH file different from the SNAP redemption information in STARS?

MS. PIERCE: The SNAP redemption information in STARS represents each retailer location. The payments data is for each bank account that gets paid.

MS. HWANG: So does that mean that the daily ACH file does not reflect payment information by store location?

MS. PIERCE: Correct.

MS. HWANG: You had previously mentioned third-party processors. Can you please draw in where third-party processors would be on this exhibit, showing the Court?

MS. PIERCE: (Witness indicating).

MS. HWANG: And does the Federal Government pay the SNAP retailer's bank directly?

MS. PIERCE: No.

MS. HWANG: Whom does the Federal Government pay?

MS. PIERCE: The EBT processor.

MS. HWANG: So does the Government payment occur before or after the retailer's bank or third-party processor's bank is paid?

MS. PIERCE: After.

MS. HWANG: Do you see the payment made by the Federal Government to the EBT processor on this exhibit?

MS. PIERCE: No.

[22] MS. HWANG: Could you please draw that payment on this exhibit to show the Court?

MS. PIERCE: (Witness complies).

MS. HWANG: Thank you.

MS. HWANG: I would like to offer into evidence Government's Exhibit 201-A. May I approach the witness to -- yes.

THE COURT: Yes. Again, you don't need to ask permission. Any objection to 201-A?

MR. ARNESON: No, Your Honor.

THE COURT: 201-A is received.

* * *

[22] CROSS EXAMINATION

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[23] MR. ARNESON: But the money that the retailers get by being involved in the SNAP Program does essentially come from the Government. Does it not?

MS. PIERCE: Yes.

MR. ARNESON: And USDA, the Defendant in this case, does keep a record, does it not, of the annual amounts that are paid to the individual retailers participating in SNAP?

MS. PIERCE: We keep a record of the amount redeemed at each retail location.

* * *

[34] MR. ARNESON: What would you say?

MS. PIERCE: That we, through the EBT processors, are reimbursing SNAP retailers for transactions that occur at their location.

MR. ARNESON: Okay. But the money is coming ultimately from the Government. Correct?

MS. PIERCE: Yes.

MR. ARNESON: The benefits are flowing back to the beneficiary of the Government program. Correct?

MS. PIERCE: The benefits go to the recipient first. That's the first thing that happens. Then they use those benefits where they choose.

MR. ARNESON: To purchase food.

MS. PIERCE: Correct.

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[35] REDIRECT EXAMINATION

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[36] MS. HWANG: Can you just briefly describe, trying to explain as simply as possible, how the EBT payment process works?

MS. PIERCE: So the EBT processor determines the amount due to each third-party or each retailer, and pays those bank accounts, and then in the instance where they are paying the third-party processor, those third parties pay the retailers' bank accounts.

The EBT processor then, after that, seeks reimbursement from the Federal Government.

MS. HWANG: So that is how the process actually works?

MS. PIERCE: Yes.

MS. HWANG: Do you know, and I've asked this before, I know, but what is the information that was requested by Argus?

MS. PIERCE: Redemption data.

MS. HWANG: So does FNS currently use the term "SNAP redemption data" in the regular course of its business?

MS. PIERCE: Yes.

MS. HWANG: And is that the information that goes to STARS?

MS. PIERCE: Yes.

MS. HWANG: And can you describe for me what goes into the ACH file?

MS. PIERCE: That would be the amount that is due to be paid to each bank account for each entity that is getting [37] paid.

* * *

[40] DANIEL CLINE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. GASTON: Good morning. Could you please state your name for the Court.

MR. CLINE: Daniel Rory Pavis Cline.

MR. GASTON: Thank you. And for the record, can you spell your name?

MR. CLINE: Certainly. D-A-N-I-E-L R-O-R-Y P-A-V-I-S C-L-I-N-E.

MR. GASTON: Mr. Cline, please state where you work.

MR. CLINE: I work at the U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program, Retailer Policy and Management Division, Retailer Management and Issuance Branch.

* * *

[57] MR. GASTON: Can you tell me how many retailers responded in total?

MR. CLINE: In total, we had 323 retailer comments.

MR. GASTON: 323. And that's represented in this table?

MR. CLINE: Yes.

MR. GASTON: I see. Mr. Cline, can you tell me what total of respondents opposed release of the information based on the grounds of CBI?

MR. CLINE: Two hundred and --

MR. GASTON: I'm sorry, I said based on the grounds of CBI, but that's just using the language in the spread sheet. Please continue.

MR. CLINE: 235 retailers opposed release of the data in [58] question.

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MR. GASTON: I see. How many did not express opposition to the release of the information requested?

MR. CLINE: So if you look here, the opinion codes, there are three; "no opposition," "no comment," and "sales submission."

[59] MR. GASTON: Yes.

MR. CLINE: The "no opposition" comments were from retailers that stated, "I have no problem with the release of this data."

"No comment" are from retailers that simply stated they had no comment.

"Sales submission" reflects those retailers who believed that the RFI was a request for SNAP redemption data, and attempted to post their individual store-level SNAP redemption data in response.

MR. GASTON: So of these three groups in aggregate, how many responded this way to the question to the RFI?

MR. CLINE: There were 88 -- Table 2 reflects 88 retailer comments.

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[69] CROSS-EXAMINATION

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[81] MR. ARNESON: Did you contact most of those trade associations?

MR. CLINE: I believe so, yes.

MR. ARNESON: And just to refresh, you did not contact anybody that was in favor of disclosure?

MR. CLINE: No.

* * *

[94] ANDREA GOLD, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. HWANG: Hello, Ms. Gold. Thank you for being here today. Ms. Gold, can you please state your full name for the record.

MS. GOLD: Andrea Gold.

* * *

MS. HWANG: And where are you employed?

MS. GOLD: I'm employed by the U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program.

MS. HWANG: And what is your position at the Supplemental [95] Nutrition Assistance Program, SNAP?

MS. GOLD: I'm the Director of the Retailer Policy and Management Division under SNAP.

* * *

[98] MS. HWANG: Are you familiar with this lawsuit brought by the Argus Leader against the United States Department of Agriculture?

MS. GOLD: I am.

MS. HWANG: What is the information at dispute in this lawsuit, to your understanding?

MS. GOLD: Retailer redemptions for the period of 2005 through 2010 for all retailer locations across the [99] nation.

MS. HWANG: And is this at a national level, state level, or individual store level?

MS. GOLD: At the individual store level.

MS. HWANG: Approximately how many SNAP retailer locations' SNAP redemption data would be affected by this lawsuit?

MS. GOLD: Approximately 321,000 retailers.

* * *

[101] MS. HWANG: So as the RPMD Director, how familiar are you with the STARS System?

MS. GOLD: Very familiar.

MS. HWANG: What does STARS stand for? Could you tell me?

MS. GOLD: Store Tracking and Redemption System.

MS. HWANG: What information is contained in STARS?

MS. GOLD: It's where we house our demographic information.

MS. HWANG: And what do you mean by "retailer demographic information"?

MS. GOLD: So the information that retailers submit as part of the application process, the reauthorization, is housed in STARS.

MS. HWANG: And can you give me some examples of what that might include?

MS. GOLD: Sure. It includes a store name, the store location address, the mailing address, the telephone number, e-mail, the type of ownership, and ownership information, store hours.

Then information on gross and food sales, whether [102] that is estimated or as reported to the IRS.

At a high level, the kinds of foods that are sold in the store. Also, their non-foods inventory and sales.

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MS. HWANG: And would FNS release, for instance, the gross sales information that a retailer submits?

MS. GOLD: No.

MS. HWANG: Why not?

MS. GOLD: That is confidential business information provided by a person.

MS. HWANG: Does the STARS database also include SNAP redemption data?

MS. GOLD: It does.

MS. HWANG: Does FNS receive SNAP redemption information? How does FNS receive SNAP redemption information?

[103] MS. GOLD: It comes to us from the EBT processors, who are contracted with each of the states that provide benefits to clients.

MS. HWANG: Does FNS receive SNAP redemption information in any other way?

MS. GOLD: No.

MS. HWANG: Does any other entity provide SNAP redemption information to FNS?

MS. GOLD: No.

MS. HWANG: Would the retailer's bank be able to provide that information to FNS?

MS. GOLD: I'm not sure.

MS. HWANG: But FNS does not currently receive that information from the retailer's bank or a third-party processor?

MS. GOLD: No.

MS. HWANG: Does FNS release SNAP redemption information in any form?

MS. GOLD: We do.

MS. HWANG: What form do you release the SNAP redemption information in?

MS. GOLD: We release aggregated redemption information at the nation, regional, state, county, zip code, and store-type level.

* * *

[104] MS. HWANG: How does the EBT processor receive information -- or, rather, how does FNS actually receive the SNAP redemption information? Where does it come from?

MS. GOLD: It comes from the state EBT processors.

MS. HWANG: Where does the state EBT processor receive that information?

MS. GOLD: It's information that is coming to them from the retailers that are operating in their – within the purview of that EBT processor.

MS. HWANG: So does the EBT processor receive that information from any other source?

MS. GOLD: No.

MS. HWANG: So how is that information generated to get to the EBT processor? Can you explain that for me?

MS. GOLD: Sure. So starting at the beginning, a client who is eligible for SNAP benefits has an EBT card and PIN. They use that card and PIN to go shopping at a retailer of their choice.

When they check out and they are paying for SNAP-eligible purchases, they swipe their card at the retailer's point of sale, enter their PIN number.

That transaction goes out to the EBT processor, who determines if the retailer is authorized, whether the [105] client has sufficient funds and an active card, and the PIN number is correct.

If all of those are true, the transaction comes back as approved. The client's account is debited. The retailer's

account is debited within two business days, business banking days.

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[105] CROSS-EXAMINATION

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[109] MR. ARNESON: I'll get specific. I think we're asking for the annual amounts that are paid out under the SNAP Program to each individual retailer in the SNAP Program. Is that correct?

MS. GOLD: Yes.

MR. ARNESON: So when you say "redemption," and I say "payment," those numbers should be the same. Correct?

MS. GOLD: Ultimately they should be the same.

MR. ARNESON: So is this not essentially the simplified version of a Government program that's a quid pro quo?

The retailers provide goods, and the Government pays the money? Is that a simplistic version of what happens?

MS. GOLD: The Government reimburses retailers for the goods provided.

MR. ARNESON: But they are the ones that produce the money -- I mean produce the benefits. Right?

MS. GOLD: Yes.

MR. ARNESON: So the shorthand version is the Government is paying for this program?

MS. GOLD: Yes. The U.S. Treasury is paying for this program. Yes.

MR. ARNESON: The Treasury. That's the Government. That's the United States taxpayers. Is it not?

[110] MS. GOLD: Yes.

MR. ARNESON: So all this EBT stuff is really just a way to facilitate that arrangement. Is that correct?

MS. GOLD: Those are the mechanics of the payment.

MR. ARNESON: Those are the mechanics of the payment. Thank you. The payment.

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[165] JOEY HAYS, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Good afternoon. Could you please state your name and spell your name for the record.

MR. HAYS: Joey, J-O-E-Y, Hays, H-A-Y-S.

MS. BENGFORD: Mr. Hays, are you employed?

MR. HAYS: Yes. Dyer Foods, Incorporated.

MS. BENGFORD: What is your position with Dyer Foods, Incorporated?

MR. HAYS: I am the president and owner.

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[176] CROSS-EXAMINATION

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[188] MR. ARNESON: Mr. Hays, do you actually provide your SNAP information to the Government directly?

MR. HAYS: No.

MR. ARNESON: And the amount of SNAP business that you do, who ultimately pays for that? Do you know?

MR. HAYS: We use First Data. That's our third-party processor, First Data. So that's where we get our money is through them.

Of course it's all -- the Federal Government is given that money at some point, but we don't deal with the Federal Government on it.

MR. ARNESON: But you are ultimately getting paid by the Federal Government. Is that true?

MR. HAYS: It's a Federal program, so I would think so.

MR. ARNESON: Federal program. I think you said a couple of times you consider the SNAP payment amount personal, confidential, and I get it.

But it is what the Government is paying you under a Government program. Is that fair?

MR. HAYS: A customer comes in our store with an EBT card. On that card they have -- it's like a debit card. So it [189] could be a welfare money that's on that card, cash, that they can take off of that card, or they could have money on that card to pay for food.

So just like a credit card, debit card, cash, or check, that's their form of payment for the product in our store.

So just like in welfare, where the money is ultimately given to by the state or whatever, and that Food Stamps are provided by the Federal Government at some point like that.

So it's a form of payment for goods and services in our stores.

MR. ARNESON: And it's ultimately at the top level -- the top of the food chain, no pun intended, it's the Government paying. Is that fair?

MR. HAYS: Sure. Yes.

* * *

[198] ANDREW JOHNSTONE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Would you state your name and spell your name.

MR. JOHNSTONE: Andrew Johnstone. That's A-N-D-R-E-W J-O-H-N-S-T-O-N-E.

MS. BENGFORD: And are you currently employed?

[199] MR. JOHNSTONE: I am.

MS. BENGFORD: And how are you employed?

MR. JOHNSTONE: I am employed as associate general counsel for Sears Holdings Management Corporation.

* * *

[204] MS. BENGFORD: And does Kmart release financial information as to Kmart?

MR. JOHNSTONE: So Sears Holdings is a publicly traded company, and we make financial disclosures consistent with the SEC's rules and regulations.

Kmart is a wholly owned subsidiary of SHC, so we do not do separate financial reporting.

I know that in the SHC financial statements, there's some high-level information about K-Mart's [205] performance. But, no, we do not specifically publish comprehensive Kmart financials.

MS. BENGFORD: And why not?

MR. JOHNSTONE: We don't think that there's any competitive advantage to us in providing that information.

To the contrary, we think K-Mart's financial performance, that's confidential and proprietary.

MS. BENGFORD: And do you provide individual SNAP information publicly? Is that available?

MR. JOHNSTONE: No. We do not publish or make available in any way SNAP information as to Kmart.

MS. BENGFORD: Do you take certain protections within the company to protect this type of information?

MR. JOHNSTONE: So as with all confidential, business, trade-secret type information, we do take

various steps to protect it from disclosure, whether deliberate or indifferent.

All of our employees are trained that they have an affirmative obligation to maintain the confidentiality of our financial information. They get regularly trained on that.

Sears Headquarters is located in Hoffman Estates, Illinois, outside of Chicago.

The Sears Campus, where most of the management and financial-type people actually work, is a closed [206] campus. You can't get on to the campus without being an employee with a badge. Or if you're a visitor, you have to be escorted at all times. You have to be checked in.

And then there's -- our computer networks, we have an IT department that works to keep the security of our computer networks, and ensure that the information that we maintain is not available, that it's kept confidential.

* * *

[207] MS. BENGFORD: I'm sorry if I already asked, but I just want to make sure I did. The SNAP information has the same level of confidentiality and protections that you previously described?

MR. JOHNSTONE: It does. It's not something that we disclose or publish. It's not something that's publicly available in any way.

* * *

[210] MS. BENGFORD: Well, I asked if you had expectations regarding SNAP data.

MR. JOHNSTONE: Well, I mean it is certainly K-Mart's expectation, when it submits that information to the Government, that that is not going to be publicly available.

* * *

[230] MS. BENGFORD: I know you haven't been innately involved in SNAP, per se, with Kmart. But would you not agree that some competition is good for the SNAP recipient?

MR. JOHNSTONE: I mean I think competition is good for America.

MS. BENGFORD: Thank you.

MR. JOHNSTONE: So I'm sure to the extent there's competition in retailers, that ultimately benefits consumers, including SNAP purchasers. So, yes, I agree with that.

MS. BENGFORD: So competition is good for America, but not too much competition?

MR. JOHNSTONE: I don't think I'm saying that.

I'm saying that information that we consider proprietary and confidential that we submitted to the [231] Government, with the understanding that it would be kept confidential, we're concerned that the release of that will cause us substantial competitive harm.

You can say that that's the impact of the free market, if that's your view.

All I can say is we are concerned about what we think the likely negative effects are of the release of the information, which is information we keep confidential and we don't disclose to anyone.

* * *

[234] PETER LARKIN, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Good afternoon, Mr. Larkin. Could you please state your name, and spell your name for the record.

MR. LARKIN: Peter Larkin. P-E-T-E-R L-A-R-K-I-N.

MS. BENGFORD: And are you currently employed?

MR. LARKIN: Yes, I am.

MS. BENGFORD: Who is your current employer?

MR. LARKIN: The National Grocers Association.

MS. BENGFORD: And what is your position with the National Grocers Association?

MR. LARKIN: I'm the president and CEO.

* * *

[250] MS. BENGFORD: So for the retailer side, for those privately [251] held corporations, do you know, do they release financial information publicly?

MR. LARKIN: Never. Not publicly. They may release it to business partners, where they are trying to obtain a loan or build a new store, but not publicly.

MS. BENGFORD: And they take certain protections to maintain the confidentiality of that information?

MR. LARKIN: They absolutely do. They limit it to as few people as possible within their organization due to the confidential nature of that information.

* * *

[291] REDIRECT EXAMINATION

MS. BENGFORD: Mr. Larkin, can you ignore sales data when looking or assessing competition?

MR. LARKIN: No.

MS. BENGFORD: And so then its actual SNAP sales individual store data, you believe that's a key piece?

MR. LARKIN: Absolutely.

MS. BENGFORD: And why is that?

MR. LARKIN: Because anybody that wants to locate a new store or compete with their current competitor now knows, you know, X number of dollars are available that are going to that competitor, and they're going to do

everything they can to capture for that percentage, whatever they can, out of that dollar amount.

[292] In today's world, they have ways of guessing. They have ways of estimating. They have market research they can do. But there is no place where they can get the actual data.

And when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released.

* * *

[314] MARY GWEN FORMAN, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Could you please state your name, and spell your name for the record.

MS. FORMAN: Yes. My name is Mary Gwen Forman. M-A-R-Y G-W-E-N F-O-R-M-A-N.

MS. BENGFORD: And are you currently employed?

MS. FORMAN: I am.

MS. BENGFORD: Who is your current employer?

MS. FORMAN: I work for Cumberland Farms.

MS. BENGFORD: And what is your position with Cumberland Farms?

MS. FORMAN: I'm the senior vice president of marketing.

* * *

[320] MS. BENGFORD: As a privately held business, does Cumberland Farms release any financial information?

MS. FORMAN: We do not.

MS. BENGFORD: Why do you not release your financial information?

MS. FORMAN: Because we believe that that could be used against us by competitors.

MS. BENGFORD: What about SNAP information? Does Cumberland Farms keep information as to individual store SNAP sales privately?

MS. FORMAN: We do, yes. Absolutely.

MS. BENGFORD: Do you release that information to anyone?

MS. FORMAN: No.

MS. BENGFORD: What about, does Cumberland Farms take any protections within Cumberland Farms to keep sales and SNAP information confidential?

MS. FORMAN: Yeah, absolutely. So we have a large number of employees as a retailer, and we keep that information among a very tight group of the senior management team.

MS. BENGFORD: Is individual store sales information as to SNAP -- I'm sorry, let me rephrase the question.

Is individual store sales information available to you in the convenience store industry?

MS. FORMAN: You mean not our own?

MS. BENGFORD: Correct.

[321] MS. FORMAN: It is not, that I know. I've never seen that published.

MS. BENGFORD: And what about SNAP information? Can you obtain individual store SNAP information anywhere?

MS. FORMAN: Not outside of our own.

* * *

[336] THE COURT: Ms. Gold, if you would retake the witness stand.

Mr. Thelen, if you could take Exhibit 201 with you.

I just want to remind you that you are still under oath to tell the truth.

ANDREA GOLD, recalled as a witness, having been previously sworn, testified as follows:

* * *

[337] THE COURT: And are there some retailers that do not use a third-party processor?

MS. GOLD: Yes. There are some retailers that are not required to provide their own service.

And so they have an option -- they continue to have an option to get Government-owned equipment at no cost.

It's a small group of exempt retailers that include farmers markets, direct marketing farmers, and some farm meal services.

THE COURT: So there the arrow would go directly from the retailer down to FNS, without going to the EBT processor?

[338] MS. GOLD: No. They still come through the EBT processor. They're just -- they would not -- the circle that shows the third-party processor would not be there.

THE COURT: So all of the data that FNS is receiving comes from the EBT processor?

MS. GOLD: Yes.

* * *

[340] RICHARD VOLPE, called as a witness, being first duly sworn, appearing by videoconference, testified as follows:

DIRECT EXAMINATION

* * *

MR. ARNESON: Could you please state your name and spell it for the record, please?

DR. VOLPE: My name is Richard Volpe. R-I-C-H-A-R-D. Last name Volpe, V-O-L-P-E.

* * *

[341] MR. ARNESON: What do you do for work?

DR. VOLPE: Our agribusiness department -- here in San Lu'ɜ Obispo.

MR. ARNESON: Should I have him repeat that? Ricky, you blitzed out on us. Can you repeat that?

DR. VOLPE: Sorry.

MR. ARNESON: Oh, it's not your fault.

DR. VOLPE: I'm an assistant professor in the agribusiness department here at the California Polytechnic State University in San Luis Obispo.

MR. ARNESON: And what does that involve in terms of your job?

DR. VOLPE: My appointment is a combination of teaching, research, and service. I'm expected to teach between five and six classes per year, conduct research on matters that are relevant to the agribusiness program, and to reach out to and interact with industry professionals throughout California.

MR. ARNESON: What is your educational background?

DR. VOLPE: I have a Bachelor's of science. Sorry?

MR. ARNESON: I just meant post-high school. Thank you. You're on.

[342] DR. VOLPE: I have a Bachelor's of science from the University of Massachusetts at Amherst, and that was a degree in mathematics and economics.

I have a Master's of science in resource economics also from UMass Amherst, and I have a Ph.D. in agricultural and resource economics from the University of California Davis.

MR. ARNESON: Could you briefly describe what your professional experience has been in the job market since you received your Ph.D. or even before?

DR. VOLPE: I received my Ph.D. in 2010 -- and I spent four years there conducting policy-relevant research before taking this job here at Cal Poly.

MR. ARNESON: I think you blanked out on us again. I'm going to ask you to repeat where you spent your last four years.

DR. VOLPE: I spent four years at the USDA Economic Research Service in Washington, D.C.

MR. ARNESON: And what did you do in that capacity?

DR. VOLPE: I was a research economist. I was tasked with conducting original research on policy-relevant issues to USDA. My specific office was focused on issues related to food markets; essentially, the economics of the food supply chain.

MR. ARNESON: Have you had any publications in your name?

[343] DR. VOLPE: Yes.

MR. ARNESON: Could you give us a brief listing of publications that you would consider to be connected to that food research?

DR. VOLPE: Sure. Well, nearly every peer-reviewed publication that has my name on it is related to research on food. This is a combination of journal articles in academic scholarly journals and research publications under the USDA banner.

I don't have the exact count. It's probably somewhere near 20 or so publications, if you combine the two types.

But I have done research on food prices, food choices, and the behavior of supermarkets; specifically, the competitive behavior of supermarkets.

* * *

[351] MR. ARNESON: Is it also part of your opinion that there is a variety of available information already in existence that can be used to make marketing decisions?

DR. VOLPE: Yes. Specifically, I understand that there is concern about these SNAP data revealing aspects of the competitive strategy of certain retailers.

However, I would argue that the competitive strategy of a food retailer, at least how I think of it, consists largely of aspects or components that are readily available simply by visiting the store.

So, for example, competitors are frequently interested in the prices, the promotional activity, the store layout, the level of customer service, and the product assortments for their competitors, and rightfully so. It's important to understand the behaviors in which your competitors are engaging in order to inform your own competitive strategy.

However, this information is available publicly. All you have to do is walk in the store, and this becomes readily apparent. Therefore, the additional insights that may be gleaned regarding competitive strategy specifically from the SNAP data in my opinion seems very limited.

[352] MR. ARNESON: If a competitor saw a store with good SNAP data, if it were disclosed, through what process do you think it would try to use that information competitively?

DR. VOLPE: Well, I imagine that it is possible that the release of a time series of annual SNAP data at the store level can enable for this sort of benchmarking analysis.

So, for example, a competitor looking at the SNAP data that have been released for various SNAP retailers are then able to observe whether or not SNAP revenues are growing or shrinking over time.

Now, a number of assumptions can be drawn from this information. But I just want to be very careful in saying that each of these assumptions can very easily be wrong, and I would expect that either potential or current competitors who gain access to these data would understand that.

Just to give one example to illustrate this. Suppose the SNAP redemption data indicate growth year over year. Well, does this reflect that the store in question is seeing its performance in profitability through changes in its pricing and promotional strategy? Maybe.

But it might also reflect simply the fact that the local demographics are evolving and SNAP enrollment are up, and it has nothing to do with this store's [353] competitive strategy.

Those are just two competing hypotheses which cannot be disentangled from one another using the SNAP data.

MR. ARNESON: Are you saying, just to make sure I understand, that -- well, let me strike that.

Well, what would the SNAP data be able to tell you, as an outside competitor, about profitability or gross sales that would include non-SNAP material?

DR. VOLPE: On its own?

MR. ARNESON: On its own.

DR. VOLPE: On its own, nothing. The SNAP data on their own, even if the SNAP redemptions are increasing year over year, it's entirely plausible that the profitability and performance for that store on average is going down.

It's not difficult to imagine how SNAP redemption in overall store revenues might actually be negatively correlated over time.

For example, if it's true that there is a strong negative stigma associated with SNAP customers, then that would make perfect sense to me, that as a store sees its SNAP

enrollment increasing due to changes in regulations or changes in local demographics, this stigma drives away non-SNAP customers, and the overall store performance is actually down.

[354] So just to answer your question, no, based on the SNAP data alone, I can't really say anything about a store's profitability or its overall gross profits or sales or anything like that.

MR. ARNESON: Well, and I think we've established there is information available to use in connection with this, if this were available. How does that change your view?

DR. VOLPE: Well, this gets back to my kind of the first major point I made about the difficulty that any outsider, any potential competitor would have in using the SNAP data to identify changes in, you know, store performance or profitability or anything along those lines.

So, for example, could a retailer, an outside retailer use those SNAP data? For the sake of argument, let's just say an outside retailer is only interested in SNAP redemptions and seeks to increase their SNAP redemptions. And that's important, because there's absolutely no way that an outside retailer could use SNAP redemption data to glean more specific information about overall store sales or overall store products.

So for the sake of simplicity, we'll restrict our focus only to potential competitors who are interested in SNAP redemption data.

Now, this cleans up the story a little bit, [355] because now potential competitors are able to look at these stores and see, "Okay, for example, over the last three years SNAP redemption data are up. This indicates to me that this might be a great neighborhood for us to move into."

Well, in order to disentangle, for example, the store effect, did this store see SNAP revenues increasing

because it's becoming a better store, it's offering better prices, it's doing a better job of attracting customers, or is it simply because the market is changing? These are, of course, two very different possibilities that would lead to two very different decisions on the part of a potential competitor.

Well, would it be possible to gain some insights into this? Sure. But a potential retailer would need to create a data set, a data set that controls for a large number of other potential confounding factors. So this data set would need an awful lot more than simply annual SNAP redemption data.

We would need information on that store's competitive strategy; prices, promotions, store layout, customer services and so on. Also, detailed time series information on local demographics; income, ethnicity, car ownership. All these factors drive food retail patronage and store selection and all that.

[356] Would it be possible to build this data set and then construct a properly specified model to disentangle potential outcomes and use the SNAP data to gain information on competitors that previously was unavailable? Yes. I do not rule that possibility completely out.

However, the work involved in this, and I'm speaking of somebody who has been doing this sort of work for years, is very involved. To build this data set would be very time-consuming, and would involve a large number of visits to the store in question, and a lot of different choices about, for example, how do we measure prices over time? How do we measure assortment over time? Which demographics do we focus on? How do we account for distances across stores?

There are many, many questions that need to be sorted out. In some cases the answers to these questions aren't

true, which all comes back to my main point that the construction of this data set and the proper analysis, data analysis, running this model identifying effects, would be very difficult, expensive, time-consuming, and highly unlikely to occur.

* * *

[361] MR. ARNESON: Do you have any knowledge of the tendency of people, consumers in the grocery business, their loyalty in terms of grocery shopping to a particular store?

DR. VOLPE: I understand that there is a body of work, a combination of there have been peer-reviewed studies looking into the factors behind store switching, and, of course, there are surveys that are readily available, many of them are readily available on the Internet that look into this issue, and the consensus seems to be that store-switching among households is relatively rare. It's relatively uncommon.

* * *

[369] RYAN SOUGSTAD, called as a witness, being first duly sworn, testified as follows:

[370] DIRECT EXAMINATION

MR. ARNESON: Dr. Sougstad, could you please state and spell your name for the record?

DR. SOUGSTAD: Yes. Ryan Sougstad. R-Y-A-N S-O-U-G-S-T-A-D.

MR. ARNESON: And where do you live?

DR. SOUGSTAD: I live in Sioux Falls.

MR. ARNESON: And what do you do?

DR. SOUGSTAD: I'm an associate professor of business administration at Augustana University.

* * *

[375] MR. ARNESON: And would it be your understanding that the question is whether the annual amounts paid to SNAP retailers, if disclosed, is likely to cause substantial competitive harm to those SNAP retailers whose information is disclosed?

DR. SOUGSTAD: Yes.

MR. ARNESON: Would you please state what your opinion is.

DR. SOUGSTAD: I do not believe that organizations will face or are likely to face substantial competitive harm due to the release of SNAP data.

MR. ARNESON: And would you please explain for us how you arrived at that opinion?

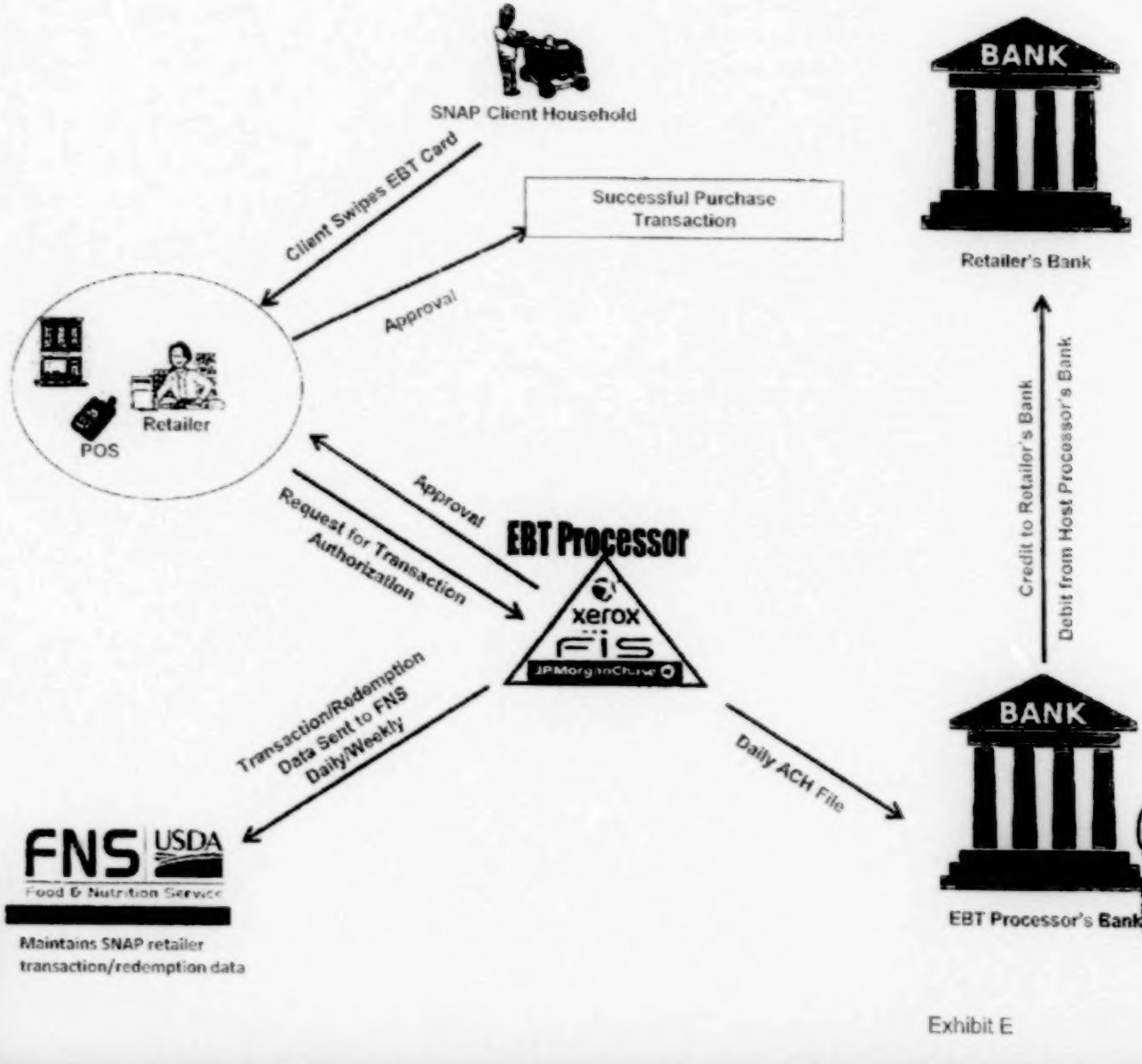
DR. SOUGSTAD: Yes. Overall, it's my opinion that organizations have such a breadth of data available to them to make strategic decisions, that the SNAP data itself is going to be marginal of value in the analysis they use.

The arguments I've seen seem to rely on this foundation, that there are stores or organizations that are protected somehow by this veil of secrecy, and if [376] this SNAP data is revealed, they are going to suffer substantial competitive harm, which I mean to believe loss of profitability. But I do not believe that to be the case.

I believe, fundamentally, that organizations and retailers need to focus on a competitive strategy. That's what's going to drive the location decision.

So what is the competitive value? How is a retailer going to compete? Those are very detailed analyses that are required. So I can imagine a large retailer will be looking first and foremost at their own data set of existing customers and be able to look at demographic data that's widely available, and be able to make a very informed location decision, with or without the SNAP data.

* * *



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MAY 19 2016
11-4121

Exhibit E

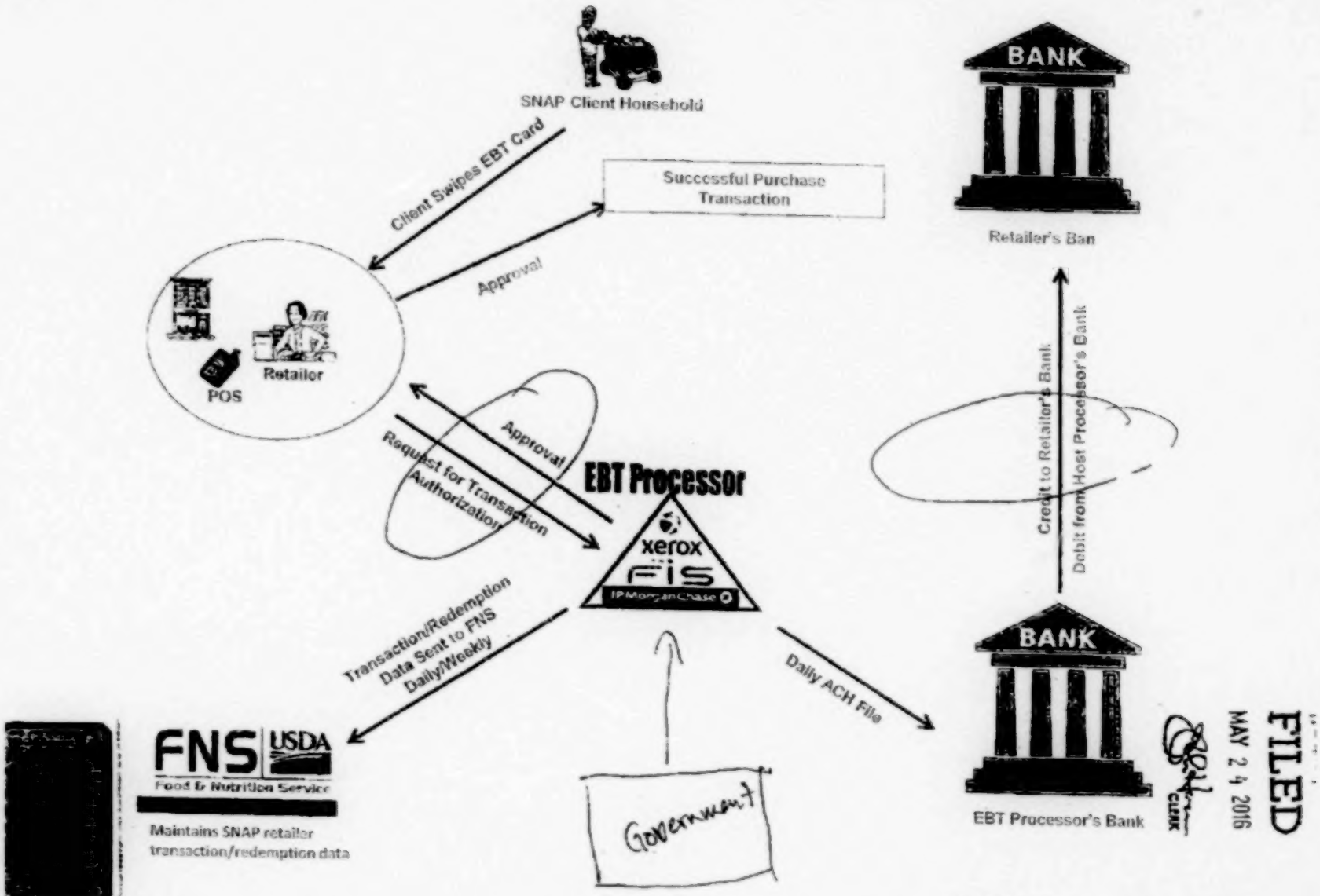

Exhibit E

FILED
MAY 24 2016
CLERK

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX VOLUME II

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PETITION FOR WRIT OF CERTIORARI FILED OCT. 11, 2018
CERTIORARI GRANTED JAN. 11, 2019

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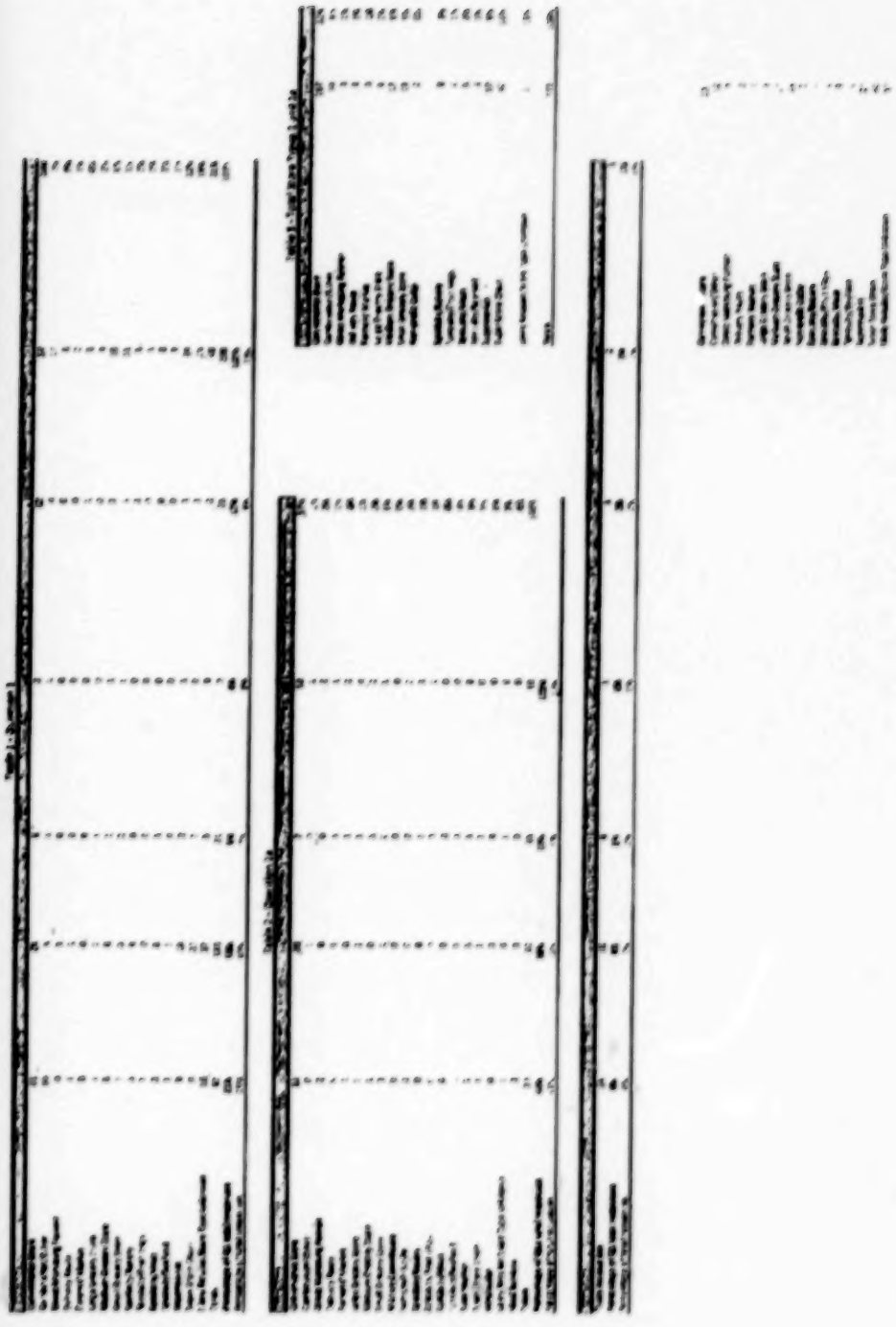
DEFENDANT'S EXHIBIT
205-1



DEFENDANT'S EXHIBIT
205-2

Submitted By		
Mandeep Singh	Convenience Store	No Comment
Golam Mamun	Convenience Store	No Comment
Nona Clare	Convenience Store	No Comment
Tony Yi	Convenience Store	No Opposition
Wasay Khan	Convenience Store	No Comment
Indar Hooda	Convenience Store	No Opposition
Vijay Reddy	Convenience Store	Sales Submission
Kwang Han	Convenience Store	No Comment
Bharatkumar Gajera	Convenience Store	Sales Submission
Constance Lhautara	Convenience Store	Sales Submission
Sabra Rahman	Convenience Store	No Opposition
John Grady	Convenience Store	No Opposition
Roy Johnson	Convenience Store	No Opposition
Brandy Hanna	Convenience Store	No Comment
Jason Meadows	Convenience Store	No Opposition
Linwood Ricks	Convenience Store	No Comment
Midland Central LLC	Convenience Store	No Opposition
Shailesh Patel	Convenience Store	No Comment
Beatriz Reyes	Convenience Store	No Comment
Jay Salameh	Convenience Store	No Opposition
Inchul Kang	Convenience Store	Sales Submission
Suresh Patel	Convenience Store	No Comment
Chris Emerson	Convenience Store	No Comment
Jaffer Bhimani	Convenience Store	No Opposition
Thomas Matuszak	Convenience Store	No Opposition
Syed Sherazi	Convenience Store	No Opposition
Farooq Adaya	Convenience Store	No Opposition
Rebecca Nay	Convenience Store	No Opposition
Sumsit Sunontadecho	Convenience Store	No Opposition
Dhaval Patel	Convenience Store	No Opposition
Ted Blanton	Convenience Store	No Comment
Grace Brock	Delivery Route	Sales Submission
Wyvonna Swanson	Farmers' Market	Sales Submission
Mohamed Said	Large Grocery Store	No Comment
Shahidul Ahmed	Large Grocery Store	No Comment
Hung Duong	Large Grocery Store	Sales Submission
Luke Jacobs	Medium Grocery Store	Sales Submission
Thomas Mulholland	Medium Grocery Store	No Opposition
Chris Dilley	Non-profit CoOp	No Opposition
Tae Lee	Likely Retailer/Store Type Unknown	Sales Submission
Nazrul Islam	Likely Retailer/Store Type Unknown	No Comment

DEFENDANT'S EXHIBIT 305-3

Davinder Khangura	Likely Retailer/Store Type Unknown	No Comment
Paul Riar	Likely Retailer/Store Type Unknown	No Opposition
Kikelomo Aboaba	Small Grocery Store	No Opposition
Steven Lucy	Small Grocery Store	No Opposition
Papa Murphys Schaad	Specialty/Bakery	Sales Submission
Eli Madrigal	Super Store Chain	No Opposition
Rebecca Stewart	Super Store Chain	No Opposition
Wayne Dahl	Super Store Chain	No Opposition
Minerva Diaz	Supermarket	Sales Submission
Avi Hershkovitz	Super Store Chain	Sales Submission
Don Han	Convenience Store	No Opposition
John Dyer	Super Store Chain	No Opposition
Wayne Heintschel	Convenience Store	Sales Submission
Gebremariam Kasseye	Convenience Store	No Opposition
Michael Gergo	Convenience Store	No Opposition
Annette Griffith	Convenience Store	No Opposition
Joseph Sessock	Convenience Store	No Opposition
James Wobig	Non-profit CoOp	No Opposition
Adon Mar	Small Grocery Store	No Comment
Joong G. Kwon	Super Store Chain	No Comment
Nga Vuu	Supermarket	No Comment
Amarjeet Lotey	Likely Retailer/Store Type Unknown	No Comment
Brandon Karau	Convenience Store	No Comment
Chul Kim	Small Grocery Store	No Comment
David Rogers	Combination/Other	No Comment
Margaret Zimmerman	Specialty/Fruit Vegs.	No Comment
Ingrid Kirst	Direct Marketing Farmer	No Opposition
Mary Chilpala	Farmers' Market	No Opposition
Tejwant Malik	Convenience Store	No Opposition
Kee Lam	Convenience Store	No Comment
Terri Stovall	Convenience Store	No Opposition
Willis Thompson	Direct Marketing Farmer	No Opposition
Abe Hassan	Convenience Store	No Comment
Charles Rose	Likely Retailer/Store Type Unknown	No Comment
Ra. Pandey	Convenience Store	No Comment
Jamie Bowman	Convenience Store	No Comment
Tim Darby	Likely Retailer/Store Type Unknown	No Comment
Abdul Merchant	Convenience Store	Sales Submission
Todd Yauck	Convenience Store	No Comment
Amirali Moosani	Convenience Store	No Opposition
Suzanne De Lyon	Large Grocery Store	No Opposition
Lorna Muir	Convenience Store	No Comment
Joong Choi	Convenience Store	No Comment
Marcos Leon	Likely Retailer/Store Type Unknown	No Comment
James Farris	Convenience Store	Sales Submission
Kathy Raches	Supermarket	No Opposition

Florida Organic Growers	Trade Association	No Opposition
Alejandro Zaragoza	Small Grocery Store	No Opposition

	A	B	C	D	E	F	G	H
1	1. Are aggregated **annual** SNAP redemption data at the individual store level confidential business information? Yes.							
2	Commenter Name	Document #	Submitter Type	Exemption 4 - Competitive Harm	Exemption 6 - Privacy	Safety	Stigma	Administrative Burden (e.g. Cost to Comply)
3	Mohamed Abdalla		Combination/Other					Yes
4	David Heisler		Combination/Other		Yes			
5	Shayne Thomasen		Combination/Other		Yes			
6	Elena Berkey Gonser		Combination/Other		Yes			Yes
7	Thomas Jenkins		Combination/Other	Yes	Yes			
8	Max Fattahian		Combination/Other	Yes				Yes
9	Chera Duhe		Combination/Other	Yes				
10	Elizabeth Segura-Vargas		Combination/Other		Yes	Yes		
11	Chad Walters		Combination/Other	Yes	Yes			
12	Mike Devine		Combination/Other	Yes				
13	Dana Lac		Super Store Chain		Yes			
14	Tom Honer		Combination/Other	Yes				
15	Martha Quinn		Convenience Store		Yes	Yes		
16	Chul Han Lee		Convenience Store	Yes				
17	Mark Hudson		Convenience Store	Yes				Yes
18	Jessie Skuse		Convenience Store		Yes			Yes
19	Wanda Blankenship		Convenience Store	Yes	Yes			
20	Wayne [illegible]		Convenience Store					
21	Anish Patel		Convenience Store					Yes
22	Larry Perrone		Convenience Store					Yes
23	Russ Cleveland		Convenience Store					Yes
24	Viv Patel		Convenience Store		Yes			
25	Pratik Patel		Convenience Store	Yes				
26	Henry Yuser		Convenience Store					Yes
27	Brenda Bocue		Convenience Store		Yes			
28	Stephen Isaac		Convenience Store					Yes
29	Abbie Burrell		Convenience Store	Yes				
30	Cindy Dang		Convenience Store					
31	Tesfaldet Gahbil		Convenience Store					
32	Robert Hernandez		Convenience Store		Yes	Yes		
33	Sanket Patel		Convenience Store					
34	Amir Dosani		Convenience Store	Yes				
35	Reena Kidd		Convenience Store		Yes			
36	Kamen Shiva		Convenience Store					
37	Ahmad Ghouleh		Convenience Store		Yes	Yes		
38	Nelda Martinez		Convenience Store			Yes		
39	Samuel Paul		Convenience Store	Yes	Yes			
40	Greg Hanlon		Convenience Store	Yes	Yes			
41	Shakil Rehman		Convenience Store					
42	Jacob Rosenberger		Convenience Store		Yes			
43	Brad Isaac		Convenience Store		Yes			

DEFENDANT'S EXHIBIT 205-4

	A	B	C	D	E	F	G	H
44	Brad T		Convenience Store	Yes			Yes	
45	Subhasagar Dattaga		Convenience Store					
46	Edward Pouch		Convenience Store	Yes			Yes	
47	Vidya Bavle		Convenience Store	Yes				
48	Jo-Phakas- Mooi		Convenience Store		Yes			
49	Steven Shelton		Convenience Store	Yes				
50	Jean Norman		Direct Marketing Farmer		Yes			
51	R Wheeler		Large Grocery Store		Yes			
52	Mark Bir		Large Grocery Store		Yes			
53	Paula Carroll		Medium Grocery Store	Yes				
54	Shubhangi Tal Son		Medium Grocery Store	Yes				
55	Jackie Yang		Medium Grocery Store				Yes	
56	Heather Chase		Medium Grocery Store				Yes	
57	Anne Roberts		Medium Grocery Store	Yes				
58	Kim Howard		Medium Grocery Store					
59	Andrew Cozens		Medium Grocery Store		Yes			
60	Charles Rose		Medium Grocery Store					
61	Prabhav Pandit		Medium Grocery Store		Yes			
62	Khoudia Mbaye		Medium Grocery Store		Yes			
63	Hazi Bader		Medium Grocery Store	Yes				
64	R L		Likely Retailer/Store Type Unknown		Yes			
65	Kathleen Barr		Likely Retailer/Store Type Unknown			Yes		
66	Angela Bowman		Likely Retailer/Store Type Unknown		Yes			
67	Jack Curtis		Likely Retailer/Store Type Unknown					Yes
68	Nora Anderson		Likely Retailer/Store Type Unknown					
69	Anonymous Anonymous 0171		Likely Retailer/Store Type Unknown					
70	Mike Murray		Likely Retailer/Store Type Unknown					
71	Philip Reid		Likely Retailer/Store Type Unknown					
72	Anonymous Anonymous 0136		Likely Retailer/Store Type Unknown		Yes			
73	Sammy Verrastro Inc		Likely Retailer/Store Type Unknown					
74	Carol Warnick		Likely Retailer/Store Type Unknown					
75	Tom Hulen		Likely Retailer/Store Type Unknown					
76	Anonymous Anonymous 0124		Likely Retailer/Store Type Unknown					
77	Lydia Hodges		Likely Retailer/Store Type Unknown					
78	John Boerner		Likely Retailer/Store Type Unknown		Yes			
79	Doug Davis		Likely Retailer/Store Type Unknown			Yes		
80	Dale Richardson		Likely Retailer/Store Type Unknown		Yes			
81	Leanne Mahoney		Likely Retailer/Store Type Unknown		Yes			
82	Tom Brown		Likely Retailer/Store Type Unknown					
83	Sharon Smith		Likely Retailer/Store Type Unknown					
84	Nicholas Smith		Likely Retailer/Store Type Unknown		Yes			
85	Doug Klein		Likely Retailer/Store Type Unknown				Yes	
86	Rick Sowell		Likely Retailer/Store Type Unknown		Yes			
87	A. Ambrose		Likely Retailer/Store Type Unknown		Yes			
88	Jeanne Clark		Likely Retailer/Store Type Unknown		Yes			

	A	B	C	D	E	F	G	H
89	Tommy Clark		Likely Retailer/Store Type Unknown		Yes			
90	Jesse Brown		Likely Retailer/Store Type Unknown		Yes			
91	Dewayne Bradel		Likely Retailer/Store Type Unknown		Yes			
92	Mike Odom		Likely Retailer/Store Type Unknown		Yes			
93	David Jackson		Likely Retailer/Store Type Unknown		Yes			
94	Valerie Smith		Small Grocery Store			Yes		
95	Alberto Espinal		Small Grocery Store		Yes	Yes		
96	David Nassar		Small Grocery Store	Yes				
97	Mike Dittemore		Small Grocery Store					Yes
98	Peshawa Kurdistani		Small Grocery Store					
99	Davis Chance		Small Grocery Store		Yes			
100	Avner Gallon		Small Grocery Store	Yes	Yes			
101	Robert Hicerstag		Specialty/Bakery	Yes				
102	John Stalker		Specialty/Bakery		Yes			
103	Teresa Arango		Specialty/Bakery		Yes			Yes
104	Darran Fox		Specialty/Bakery	Yes	Yes			
105	Chris Copp		Specialty/Bakery					
106	Julie Cavitt		Specialty/Bakery		Yes			
107	Brook Ridley		Specialty/Meat		Yes			
108	Sharnil Maharaj		Specialty/Meat	Yes	Yes			
109	Raul Hernandez		Specialty/Meat	Yes		Yes		
110	Keith Bohn		Specialty/Meat		Yes			
111	Walter Dobbs		Specialty/Seafood		Yes			
112	Stan Hagen		Super Store Chain	Yes	Yes			
113	Daniel & Scott Kick & Mascho		Super Store Chain			Yes		
114	Bucky Lishman		Super Store Chain	Yes				
115	Craig Gaylord		Super Store Chain	Yes				
116	Frank Knighton		Super Store Chain	Yes				
117	Bambi Weber		Super Store Chain		Yes			
118	Bob Tattoua		Super Store Chain	Yes				
119	Randy Jackson		Super Store Chain	Yes				
120	Bobby Rikard		Super Store Chain		Yes			
121	Phillip Messer		Super Store Chain		Yes			
122	Ron Jennings		Super Store Chain		Yes			
123	Joe Sellers		Super Store Chain		Yes			
124	Carlise Griggs		Super Store Chain		Yes			
125	Robert Ridgeway		Super Store Chain		Yes			
126	Drew Humphries		Super Store Chain		Yes			
127	Korey Gaines		Super Store Chain		Yes			
128	Chuck Jones		Super Store Chain		Yes			
129	Clarence Shelley		Super Store Chain		Yes			
130	Richard Gore		Supermarket		Yes			
131	Allan Bellamy		Supermarket	Yes				
132	Tommy Formenot		Supermarket		Yes			
133	Mark Sandar		Supermarket	Yes				

	A	B	C	D	E	F	G	H
234	Steph Vincent		Supermarket					
235	Karen Hines		Supermarket	Yes	Yes			
236	Chris Delaino		Supermarket		Yes			
237	Betty Martin		Supermarket	Yes	Yes			
238	Bryan Goldenrush		Supermarket		Yes			
239	Anmarie Hilburn		Supermarket		Yes			
240	David Ho		Supermarket					
241	Jake Fennel		Supermarket		Yes			
242	Susan Day		Supermarket		Yes			
243	Gregory Bones		Supermarket		Yes			
244	Jerry Williams		Supermarket		Yes			
245	Dan Bryar		Supermarket		Yes			
246	Regina Stanes		Specialty/Fruit Vegs	Yes				
247	Lena Hoffman		Specialty/Bakery	Yes	Yes			
248	Anonymous Anonymous 0324		Liquor Retailer/Store Type Unknown					
249	Sam Martin		Small Grocery Store		Yes			
250	Kathleen Reeves		Combination/Other		Yes		Yes	
251	Joe Diehl		Combination/Other		Yes			
252	Vanessa Butte		Convenience Store		Yes			
253	John Williams		Convenience Store	Yes	Yes			
254	Paul Lee		Specialty/Meat		Yes			
255	Maria Webb		Combination/Other					
256	Paul Lee		Convenience Store	Yes				
257	Sidney Brush		Supermarket	Yes	Yes			
258	Kate Thomas		Liquor Retailer/Store Type Unknown			Yes	Yes	
259	Thomas Nguyen		Liquor Retailer/Store Type Unknown					
260	Daniel Torres		Specialty/Seafood	Yes				
261	Sheila Adair		Convenience Store	Yes		Yes		
262	Chris Raymond		Supermarket					Yes
263	Alan Sequoia		Supermarket	Yes	Yes			
264	Ramon Consequentes		Convenience Store	Yes	Yes			
265	Mark Kelly		Medium Grocery Store		Yes			
266	Raul Flores		Convenience Store	Yes	Yes			
267	Tamara Williamson		Convenience Store		Yes			
268	Juan Sequoia		Medium Grocery Store	Yes		Yes	Yes	
269	Omar Ahmed		Convenience Store	Yes	Yes	Yes		
270	G		Medium Grocery Store					
271	Randi Cushman		Liquor Retailer/Store Type Unknown					
272	Tony Al Havara		Combination/Other			Yes	Yes	
273	Bob Steen		Convenience Store		Yes			
274	Adam Berghe		Super Store Chain					Yes
275	Lydia Chang		Small Grocery Store					
276	Helen Schneider		Specialty/Bakery		Yes			
277	Bobby Reeves		Convenience Store					
278	Mehdi Ghafari		Liquor Retailer/Store Type Unknown				Yes	
279			Convenience Store					

	A	B	C	D	E	F	G	H
179	Ramon Luna		Convenience Store					
180	Mary Gee		Convenience Store					Yes
181	Kevin Dresser		Large Grocery Store	Yes				
182	Christos Giannopoulos		Supermarket	Yes	Yes			
183	Anonymous Anonymous 8457		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
184	B. Arab		Super Store Chain	Yes		Yes		Yes
185	Mark Posch		Supermarket	Yes	Yes			
186	Jack Senior		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
187	David Dwyer		Super Store Chain	Super Store Chain	Yes			
188	B. Hooper		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
189	Patrick Pratt		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
190	Shaun Orla Howard		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
191	Steve Geaslein		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
192	Bruce Williams		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
193	Richard Bauer		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
194	Jason Woodson		Super Store Chain	Super Store Chain	Yes			
195	Brian Lankford		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
196	Raymond Bonath		Super Store Chain	Super Store Chain	Yes			
197	Carmie Suggs		Super Store Chain	Super Store Chain	Yes			
198	Kelly Stevens		Super Store Chain	Super Store Chain	Yes			
199	Gregory Murray		Super Store Chain	Super Store Chain	Yes			
200	Eric Vinson		Super Store Chain	Super Store Chain	Yes			
201	Jason Kelley		Super Store Chain	Super Store Chain	Yes			
202	Morgan Purnell		Super Store Chain	Super Store Chain	Yes			
203	James Thompkins		Super Store Chain	Super Store Chain	Yes			
204	David Hart		Convenience Store	Convenience Store	Yes			
205	Steven Phillips		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
206	Andrew Sneffer		Convenience Store	Convenience Store	Yes			
207	Nikki Ayala		Medium Grocery Store					Yes
208	Tina Hatch		Combination/Other	Yes				
209	Darryl Miller		Super Store Chain	Yes				
210	Barb Hafermann		Super Store Chain	Yes	Yes			Yes
211	Ken North		Combination/Other	Yes				
212	Dora Wakefield		Small Grocery Store	Yes			Yes	
213	Jamal Bryant		Delivery Route	Yes	Yes			
214	Rachel Steinberg		Specialty/Seafood					
215	Dawn Lowe		Likely Retailer/Store Type Unknown	Likely Retailer/Store Type Unknown	Yes			
216	James Irvine		Super Store Chain	Super Store Chain	Yes			
217	Michael Prado		Large Grocery Store			Yes		
218	Diana Lee		Super Store Chain	Super Store Chain	Yes			
219	Randy Rockwood		Supermarket	Yes			Yes	
220	Norberto Benitez-Cabrera		Supermarket		Yes			
221	Linda Sullivan		Farmers' Market			Yes		Yes
222	Derek Reed		Convenience Store				Yes	Yes
223	Vic Patel		Convenience Store		Yes			

	A	B	C	D	E	F	G	H
224	Becky Custer		Convenience Store					
225	Jonnny Doscher		Super Store Chain		Yes			
226	Rob Mersiak		Combination/Other	Yes				
227	Moua Yang		Specialty/Meat		Yes			
228	Patrick Davis		Delivery Route					
229	Robin Peterson		Convenience Store					
230	Thu Bui		Convenience Store					Yes
231	Calvin Smith		Convenience Store	Yes	Yes			
232	Northwest Grocery Association		Trade Association		Yes			
233	Lee Wash		Small Grocery Store		Yes			
234	Jeff Rode		Likely Retailer/Store Type Unknown					
235	National Retail Federation		Trade Association	Yes				
236	Morrison & Foerster LLP		Trade Association	Yes				
237	Food Marketing Institute		Trade Association	Yes				
238	Kmart Corporation		Trade Association	Yes			Yes	
239	New England Convenience Store Association		Trade Association		Yes			
240	Steptoe & Johnson LLP (NACS & SIGMA)		Trade Association	Yes				
241	Todd Gritter		Medium Grocery Store	Yes	Yes			Yes
242	Sarbir Gill		Convenience Store		Yes			
243	Cheri Bellamy		Supermarket		Yes	Yes		
244	Peter Ibrahim		Likely Retailer/Store Type Unknown		Yes	Yes		Yes
245	National Grocers Association		Trade Association	Yes	Yes		Yes	
246	Greenberg Traurig		Trade Association	Yes	Yes		Yes	
247	Minnesota Grocers Association		Trade Association	Yes	Yes	Yes	Yes	Yes
248	Cumberland Farms		Trade Association	Yes	Yes			
249	Texas Retailers Association		Trade Association				Yes	Yes
250	Associated Grocers		Trade Association	Yes				
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No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act protects from mandatory disclosure all "confidential" private-sector "commercial or financial information" within the Government's possession. 5 U.S.C. § 552(b)(4). The Circuits have adopted a definition of "confidential" that departs from the term's ordinary meaning, holding that this exemption applies only if disclosure is "likely * * * to cause substantial harm to the competitive position of" the source of the information. *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The D.C. Circuit fashioned this atextual test from its own sense of FOIA's purposes based on the legislative history of witness testimony in a congressional hearing about a predecessor bill from a prior Congress. The amorphous test has produced at least five different splits as the Circuits have grappled with what constitutes a likelihood of substantial competitive harm. The questions presented are:

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus precluding mandatory disclosure of all "commercial or financial information" that is privately held and not publicly disseminated, regardless of whether a party establishes substantial competitive harm from disclosure?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the party opposing disclosure establishes a reasonable possibility that disclosure might injure financial or commercial interests?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Food Marketing Institute was an intervenor-defendant in the U.S. District Court for the District of South Dakota and the appellant in the U.S. Court of Appeals for the Eighth Circuit.

The U.S. Department of Agriculture was the defendant in the district court but was not a party to the Eighth Circuit appeal.

Respondent Argus Leader Media was the plaintiff in the district court and the appellee in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition remains accurate.

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FOOD MARKETING INSTITUTE,

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v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (Pet. App. 1a-6a) is reported at 889 F.3d 914 (8th Cir. 2018). The court of appeals' judgment (Pet. App. 7a-8a) and order denying rehearing *en banc* (Pet. App. 85a-86a) are unreported.

The district court's memorandum opinion and order (Pet. App. 9a-21a) is reported at 224 F. Supp. 3d 827 (D.S.D. 2016). The district court's judgment (Pet. App. 22a-23a) and order granting FMI's motion to intervene (Pet. App. 71a-78a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May 8, 2018. The court denied rehearing *en banc* on July 13, 2018. The petition for a writ of certiorari was filed on October 11, 2018, and granted on January 11, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act provides:

(a) Each agency shall make available to the public information as follows:

* * *

(8)(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); * * *

* * *

(b) This section does not apply to matters that are—

* * *

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * *.

5 U.S.C. § 552(a)(8)(A)(i)(I), (b)(4).

For the Court's convenience, Subsections (a)(8) and (b) of the Freedom of Information Act are reprinted in their entirety in the Appendix, *infra*.

PRELIMINARY STATEMENT

Exemption 4 of FOIA protects from mandatory disclosure all "confidential" information that is "commercial or financial" and "obtained from a person." 5 U.S.C. § 552(b)(4). The issue before this Court is straightforward: what does "confidential" mean?

Petitioner FMI contends that this word bears its ordinary meaning—something is "confidential" if it is kept private and not publicly disclosed. This Court's precedents along with well-established rules of statutory construction

dictate that result: "Confidential" is an unambiguous word with a longstanding, ordinary meaning.

The atextual alternative, crafted decades ago by the D.C. Circuit and adopted by the court below, is to define "confidential" as having two separate and necessary prongs:

> (1) The information is kept private and not publicly disclosed; *plus*
>
> (2) "Substantial competitive harm" would likely result if the information is not kept private and is publicly disclosed.

See *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

But everything after the "plus" is logically implausible—the first prong alone defines the term "confidential." Worse, everything after the "plus" is extratextual. Congress chose not to give "confidential" a different definition for FOIA; it chose to use an ordinary term in common usage. "Confidential" means confidential; that is enough to decide this case.

Furthermore, this atextual test is unworkable, unduly complex, and unpredictable. There is no serious argument that Congress itself endorsed a reading that so departs from the words that it used. All that the lower courts have left is circuit-level *stare decisis*, which of course does not bind this Court.

This Court should therefore repudiate *National Parks* and clarify that "confidential" in FOIA Exemption 4 bears its ordinary meaning.

STATEMENT

I. FACTUAL BACKGROUND

A. The Supplemental Nutrition Assistance Program (SNAP)—formerly, the Food Stamp Program—is a federal program that provides nutritious food to low-income families through normal economic channels. 7 U.S.C. § 2011. The federal government funds SNAP benefits and splits the costs of administering the program with the states, which distribute benefits.[1]

SNAP beneficiaries use electronic benefit transfer (EBT) cards, which resemble ordinary debit cards, to redeem food items from eligible retailers. JA49. Each state selects and contracts with a commercial entity to be its EBT processor. JA78. When the SNAP beneficiary uses the EBT card at the store, the sale information is electronically transferred to the state's EBT processor, which verifies eligibility for the purchase and approves or denies the transaction.[2] JA76-77; JA89-JA90, JA108-109. The typical EBT-processor contract that USDA entered into evidence—the 2009 contract from Arkansas—requires that the EBT processor treat the transactions confidentially. Def's Tr. Ex. 202 at 74-75.

EBT processors send each individual retail location's daily SNAP-redemption totals to the Food Nutrition Service (FNS), an agency within the U.S. Department of Agriculture (USDA). JA78-79. FNS loads the retailers' information into its Store Tracking and Redemption System (STARS), a database that FNS uses to house retailer application information, monitor a retailer's SNAP

---

[1] SNAP, https://www.fns.usda.gov/snap/short-history-snap (last visited Feb. 14, 2019)

[2] Some retailers submit information directly to the state's EBT processor; most contract with a third-party commercial point-of-sale processor of their choice that acts as an intermediary with the state's EBT processor. JA76-77.

compliance, and manage retailer participation in SNAP.[3] JA74-75, JA79.

Although the STARS database contains store-level SNAP redemption data, FNS does *not* use this store-level data to pay retailers. JA79. The redemption data is not a record of Government payments. Reporter's Record I:37-38. Instead, the EBT processors make payments to the retailers' designated bank accounts, which may be associated with multiple stores. Reporter's Record I:38-39. The EBT processors make this payment through an Automated Clearing House file routinely used for many types of electronic financial transactions, and this file "does not reflect payment information by store location." JA81; see also JA108-109. The federal government later repays the EBT processors. JA81-82; see also JA108-109.

Substantial amounts of SNAP data, including information about program costs, are publicly available. USDA "release[s] aggregated redemption information at the nation, regional, state, county, zip code, and store-type level." JA89. Anyone can also view monthly and annual SNAP costs on a national and state level on USDA's website.[4]

USDA does not, however, disclose retailer data regarding the amount of SNAP redemptions at an individual store. For 40 years, the department has withheld this data based on its official interpretation of 7 U.S.C. § 2018(c). Section 2018(c) requires SNAP-applicant retail food

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[3] The EBT processor also sends a file to the Anti-Fraud Locator using EBT Retailer Transactions ("ALERT") system that "contains the detailed transactions that occurred at retailers in each state." JA79. The Government uses this information to detect fraud. JA80. Argus Leader did not request the ALERT-system information, *see* JA41-42, which is not at issue in this case.

[4] SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited Feb. 13, 2019).

stores to submit certain information to USDA related to SNAP. It further provides that "[r]egulations issued pursuant to [the Act] shall provide for safeguards which limit the use or disclosure of information obtained under * * * this subsection to purposes directly connected with administration and enforcement of the Act or the regulations * * *." *Ibid.* USDA first incorporated this policy into its rules in 1978, explicitly prohibiting the disclosure of information from retailers regarding "their redemptions of coupons." 43 Fed. Reg. 43,272, 43,275 (Sept. 22, 1978). The current regulations, codified at 7 C.F.R. § 278.1(q), permit limited disclosures of retailers' information to law enforcement and to certain government agencies and their associated contractors. USDA has thus had "a long-standing policy regarding treatment of this data as confidential" pursuant to this rule, and retailers have participated in SNAP "under the expectation that such data would be protected." JA71-72.

B. Respondent Argus Leader is a newspaper in Sioux Falls, South Dakota. In 2011, an Argus Leader reporter filed a FOIA request for SNAP data. JA41-42. For each SNAP retailer nationwide, Argus Leader requested from the "STARS database for fiscal years 2005 through 2010" the store identifier, name, address, type, and "yearly redemption amounts, or EBT sales figures, for each store." JA41. The request implicates approximately 321,000 retailer locations. JA87. USDA released most of the requested information but withheld the store-level SNAP sales data. Pet. App. 26a.

II. Proceedings Below

A. The lawsuit and initial litigation

After USDA refused to disclose store-level SNAP sales data, Argus Leader filed suit in the U.S. District Court for the District of South Dakota. USDA asserted that it could withhold the information under FOIA

Exemptions 3, 4, and 6. Pet. App. 10a.

Exemption 3 allows an agency to withhold information when another federal statute prohibits disclosure. 5 U.S.C. § 552(b)(3). The district court granted USDA's motion for summary judgment on the grounds that 7 U.S.C. § 2018(c) limits the use or disclosure of information submitted by applicants and participating SNAP retailers to purposes directly connected to administering or enforcing the Food and Nutrition Act of 2008. Pet. App. 49a. The Eighth Circuit reversed, concluding that § 2018(c) did not apply because retailers did not themselves submit their information directly to the Government, but instead used third-party EBT processors. *Id.* at 54a.

B. Proceedings in the district court

1. On remand, USDA pressed its separate argument that Exemption 4 protects store-level SNAP sales data.[5] Pet. App. 10a. That provision exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

To determine whether information is "confidential" under FOIA Exemption 4, the Eighth Circuit applied the D.C. Circuit's approach from *National Parks*, 498 F.2d at 770. Under that test, Exemption 4's applicability turns not on whether the information is in fact held as "confidential" (the term in the statute) but on whether disclosure would likely "'cause substantial [competitive] harm,'" Pet. App. 16a—a standard invented by *National Parks* and absent from FOIA's text. After denying USDA's summary-judgment motion, *id.* at 10a, the district court held a bench trial to assess the competitive harms associated with releasing the requested data, *id.* at 11-13a, 87a.

The trial lasted two days. USDA employees testified

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[5] USDA did not pursue its Exemption 6 argument.

how the agency receives store-level sales data from the retailers through the EBT processors, maintains that information in STARS, and does not publicly disclose or release that data. JA76-82, JA89-90. Industry witnesses from a cross-section of SNAP retailers, including a supermarket chain, a large department store, a wholesale grocer, a convenience store, and the National Grocers Association, testified that retailers consistently protect store-level sales data and participate in SNAP with the understanding that such data will remain confidential. Pet. App. 11a-12a, 88a-89a; see also JA93-98. USDA's expert witness was the vice president of a consumer-research firm that performs market analysis, site location, and forecasting research in the food industry, and who testified regarding the competitive consequences for that industry of publicly releasing store-level SNAP data. Pet. App. 13a.

These witnesses confirmed that retailers keep their store-level SNAP-redemption data confidential, and they explained some of the commercial motivations supporting that practice. JA93-98 Releasing store-level data would directly threaten stores' competitive positions, they explained, by revealing key information about sales and clientele that competitors otherwise cannot access. *Ibid.* To make critical decisions regarding store locations and sales strategies, retailers use models of consumer behavior. Reporter's Record II:388-391. An important component of these models is competitors' estimated sales volume—something that is time-consuming and expensive to generate. *Id.* at II:389-391. The models' accuracy increases *significantly* when using actual sales data rather than mere estimates. *Id.* at II:391.

USDA's expert testified that the disclosure of store-level SNAP data—information that is currently unavailable in the market—would thus create a "windfall" for his company and other data-analysis firms. Reporter's Record II:393-396. USDA's witnesses unanimously agreed

that this disclosure would cause substantial competitive harm to the retailers. For example, stores with high SNAP redemptions would see increased competition from existing competitors for those SNAP customers, *id.* at II:324; new market entrants would use SNAP data to determine where to build their stores—a decision fraught with risk and uncertainty when sales data is unknown, *id.* at I:252-253; and SNAP-redemption data could also be used to understand a retailer's overall sales, a highly valuable figure that competitors currently expend substantial resources trying to estimate, *id.* at II:394-397; see also Pet. App. 11a-13a, 18a.

In addition, retailers testified to their concerns that their SNAP-beneficiary customers may be stigmatized by the release of store-level SNAP data, to the detriment of those customers and the retailers that serve them. *Id.* at I:176, I:194. Some non-SNAP customers may avoid high-SNAP stores, and even SNAP customers may prefer to avoid "that limelight" of shopping at a high-SNAP-sales store. *Id.* at I:194. Such singling-out was one of the harms the Government hoped to eliminate when it replaced SNAP beneficiaries' food-stamp coupons with more discreet EBT cards. *Id.* at I:254.

These commercial risks are exacerbated by the famously fierce competition and notoriously narrow profit margins in the food-retail industry, which force retailers to rely on high sales volumes for profitability. Pet. App. 12a, 17a-18a. Moreover, in recent years, traditional grocers have also faced unprecedented competition from superstores like Costco, new low-price format stores like Lidl, upscale organic format stores like Whole Foods, non-grocers like the Dollar Store, and even online retailers like Amazon. Reporter's Record I:247-249. Confidentiality of SNAP-redemption data is consequently critical to retailers, so much so that the National Grocers Association's President testified that some retailers may rethink their

participation in SNAP altogether if this sensitive information is released. *Id.* at II:294.

Argus Leader presented no fact witnesses. Two expert witnesses testified on its behalf, neither of whom works in the food-retail industry. JA100, JA106. These witnesses acknowledged the competitive nature of the industry, and they did not dispute that retailers do not publicly disclose store-level SNAP data. Reporter's Record II:350, II:366. They contended, however, that because retailers currently make decisions using their own data and publicly available demographic data, adding previously-unavailable store-level SNAP data would have only a limited competitive impact. Pet. App. 12a-13a; see also JA102-103, JA107.

2. Following the bench trial, the district court entered judgment in favor of Argus Leader. Pet. App. 22a. Though there was no dispute that retailers prize the information's confidentiality, and despite finding in accordance with all the testimony that "competition in the grocery business is fierce," *id.* at 17a, the district court concluded that "any potential competitive harm from the release of the requested SNAP data is speculative at best," *id.* at 19a. Given the Eighth Circuit's adoption of the *National Parks* test for FOIA Exemption 4, this level of competitive harm did not, in the district court's view, rise to the level where the SNAP data could be treated as "confidential" under Exemption 4. *Id.* at 20a.[6]

3. Shortly after the district court issued its ruling,

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[6] The district court also found, following post-trial briefing by both parties on the issue, that the requested store-level sales data was information "obtained from a person" under Exemption 4. Pet. App. 16a. As the Eighth Circuit noted, neither party contested that finding on appeal, and the Eighth Circuit proceeded on that understanding. *Id.* at 2a n.2. Any argument to the contrary therefore has been forfeited.

USDA informed retailers that it intended to abide by the district court's judgment and release the store-level SNAP data, Pet. App. 72a, signaling that it would not appeal and notifying affected retailers so they could consider "possible judicial intervention."[7] Petitioner Food Marketing Institute (FMI)—a trade association whose members operate tens of thousands of retail food stores, many of which participate in SNAP—immediately moved to intervene and then appeal the judgment. *Id.* at 72a-73a. FMI had previously assisted USDA with the case, including by submitting a declaration in support of USDA's Exemption 4 summary-judgment motion. Dist. Court Doc. 59-4 Ex. D1.

The district court granted FMI's motion to intervene and stayed its judgment pending appeal. Pet. App. 77a-78a.[8] Once FMI became a party, USDA informed the court that it would continue withholding the requested documents pending resolution of FMI's appeal and asked the district court to deny Argus Leader's motion to compel immediate disclosure as moot. District Court Doc. 148 at

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[7] USDA posted a notice on its website: "This notification is provided to your firm to comply with 1 C.F.R. 1.12(d) * * * in order that the matter may be considered for possible judicial intervention." SNAP Retailer Data, https://web.archive.org/web/20170121025513/https://www.fns.usda.gov/snap-retailer-data (published Jan. 18, 2017; last visited Feb. 15, 2019).

[8] Before the district court, Argus Leader opposed FMI's motion to intervene because it contended that FMI should have intervened earlier. The district court rejected that argument, and no party challenged the intervention on appeal. Argus Leader's brief in opposition suggested that FMI may not have Article III standing. BIO 28. FMI's standing is secure: FMI's members seek to keep SNAP-redemption data about their individual stores confidential, the judgment below compels release of that information, and reversal would eliminate that mandatory disclosure so that USDA could withhold it as it has long promised to do.

2. USDA also moved to amend a protective order so that FMI would have access to sealed portions of the record in prosecuting the appeal. District Court Doc. 154.

C. Proceedings in the court of appeals

The Eighth Circuit affirmed. FMI urged reversal of the district court's opinion, asserting that "confidential" in Exemption 4 should be given its plain meaning, consistent with this Court's precedents. It was undisputed at trial that neither USDA nor the retailers publicly disclose retailers' store-level SNAP sales data, and that retailers expected their information to be kept confidential by the Government. Pet. App. 11a-13a, 88a-89a; JA88-89; JA94-95. The court of appeals, nevertheless, disposed of this argument in a single footnote: it would not consider the plain meaning of the word "confidential" because doing so purportedly "would swallow FOIA nearly whole," and conflict with what the court of appeals believed to be this Court's guidance that FOIA exemptions should be narrowly construed. *Id.* at 4a n.4.

FMI separately urged reversal on the basis that disclosing the requested information would result in enough competitive harm to trigger Exemption 4's protection under even the atextual *National Parks* test. But like the district court, the court of appeals reasoned that, while the requested data might make models marginally more accurate, the evidence did not show that "this marginal improvement in accuracy is likely to cause *substantial* competitive harm." Pet. App. 5a. The panel emphasized that even if there was a "likelihood of commercial usefulness"—in other words, that third parties indeed could exploit information that their competitors had confidentially submitted to the Government—that was insufficient to trigger Exemption 4 because it was "not the same as a likelihood of substantial competitive harm." *Ibid.* The panel did not address the precedents from other Circuits

that FMI relied on in support of its position. See *id.* at 5a-6a.

The Eighth Circuit denied both FMI's petition for rehearing *en banc*, Pet. App. 85a-86a, and its motion to stay issuance of the mandate, *id.* at 79a-80a.

D. This Court's recall and stay of the Eighth Circuit's mandate

FMI filed an application with this Court to recall the Eighth Circuit's mandate and stay the judgment, arguing that all of the recall-and-stay factors were satisfied: (1) there was a reasonable probability that the Court would grant certiorari; (2) there was a fair prospect that the Court would reverse the Eighth Circuit's judgment; (3) absent a stay, FMI's members would suffer irreparable harm; and (4) the balance of equities favored a stay. The Court issued an order that recalled the Eighth Circuit's mandate and stayed its judgment pending resolution of FMI's petition and issuance of this Court's judgment. Pet. App. 82a. The Eighth Circuit issued an order to the same effect. *Id.* at 83a-84a. This Court then granted certiorari.

SUMMARY OF ARGUMENT

Store-level SNAP-redemption data is not subject to mandatory disclosure under FOIA. That data satisfies Exemption 4 because it is "commercial or financial information" that is "confidential"—information that is held privately and not public disseminated.

I. A. The plain text of Exemption 4 is sufficient to resolve this case and reverse the judgment below. The word "confidential" is unambiguous. When Congress enacted it as part of FOIA in 1966, that word meant what it still means today—something that is private and not publicly disclosed.

An instruction to "keep this confidential" leaves no doubt that public release is not authorized. Popular and legal dictionaries confirm this meaning. So do cases from

this Court—including one defining "confidential" *in another FOIA exemption*. See *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993) (Exemption 7). Courts construing Exemption 4 soon after its enactment—including the D.C. Circuit—adopted the plain meaning of "confidential." And the Senate and House Reports issued with FOIA confirm this construction.

B. Eight years after FOIA's enactment, the D.C. Circuit deviated from its prior plain-text reading of "confidential," and other Circuits reflexively followed. *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) imposed an additional requirement absent from Exemption 4's text—that commercial information will not be deemed "confidential" unless a showing of substantial competitive harm is made.

National Parks reached that result only by disregarding *both* the plain text *and* oft-cited legislative history (the Senate and House Reports). Instead, *National Parks* relied on the weakest form of legislative history: witness statements in Senate subcommittee hearings from a prior Congress that considered an unenacted predecessor bill to FOIA.

The *en banc* D.C. Circuit retained the substantial-competitive-harm test nearly two decades later, but only because it was yoked by *stare decisis*. It refused to apply that test to information *voluntarily* submitted to the Government. For such information, it returned to the plain meaning of "confidential." Typically, a given word used multiple times in a statute bears the same meaning—but the D.C. Circuit has given "confidential" *two* different meanings for its *single* appearance in Exemption 4.

No other reasons warrant endorsing *National Parks*. *Stare decisis* does not bind this Court to circuit precedents. Policy arguments—that giving "confidential" its plain meaning would undermine FOIA's pro-disclosure

purpose—fail given the unambiguous text and because Exemption 4 reflects Congress's purpose just like any other FOIA provision. Nor has Congress endorsed *National Parks*: It has never amended or reenacted Exemption 4 since FOIA's 1966 promulgation. *National Parks* is affirmatively wasteful, unworkable, and unpredictable; ending its reign would save substantial governmental and judicial resources, aiding FOIA requesters and submitters alike.

C. The plain meaning of "confidential" covers store-level SNAP-redemption data. Retailers carefully and uniformly guard that data. They know how their competitors would use it, for example, in determining ideal locations for new grocery stores. At the least, SNAP data must be treated as "confidential" because USDA's long regulatory history assured retailers that the agency would hold SNAP-redemption data confidential and that releasing it would trigger criminal sanctions. Retailers who confide in the Government under such circumstances should be able to rely on the resulting confidentiality.

II. Even if the Court chooses to leave *National Parks* intact, it should nonetheless reverse the judgment below. *National Parks* has generated division among the Circuits regarding what qualifies as substantial competitive harm. The Eighth Circuit could deny Exemption 4 status to SNAP-redemption data only by requiring heightened proof of specific resulting harm. A proper standard, reflected in other Circuits' cases, would ask if there is a reasonable possibility that disclosure may injure a commercial or financial interests, either directly or indirectly. That objective standard is far easier and less costly to apply than the current regime. And it would align the substantial-competitive-harm test with, for example, the requisite showing to establish a competitive injury under the Robinson-Patman Act.

ARGUMENT

I. "CONFIDENTIAL" COMMERCIAL INFORMATION IN FOIA EXEMPTION 4 COVERS ALL INFORMATION KEPT PRIVATE AND NOT PUBLICLY DISCLOSED

In Exemption 4, Congress exempted "confidential" commercial information from mandatory disclosure under FOIA. Congress neither provided nor authorized any further gloss on that commonly used and understood word. No justification for departing from the plain text—policy, legislative history, or otherwise—withstands scrutiny. The Court should hold that the word "confidential" in Exemption 4 means the same thing that "confidential" means elsewhere: something kept private and not publicly disclosed.

A. This Court's precedents require a plain-text interpretation of "confidential" in Exemption 4

Both as a matter of this Court's general statutory-construction principles and its specific FOIA case law, "confidential" should be given its ordinary meaning: information that is kept private and not publicly disclosed. In fact, this Court *already has* given "confidential" that meaning in a variety of contexts, including when it considered a separate FOIA exemption using that word.

1. Both in dictionaries and case law, "confidential" uniformly means "private and not publicly disclosed"

This Court has repeatedly instructed that all statutory construction begins with the text and goes no further when statutory language is plain. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). Words must be understood according to "their ordinary meaning at the time Congress enacted the statute." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 535 (2019) (internal quotation marks and modifications omitted).

These principles govern the construction of FOIA's exemptions, just like they govern all unambiguous statutory provisions. As the Court put it when considering Exemption 4's neighbor, "[w]e * * * simply interpret Exemption 5 to mean what it says." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 804 (1984); see also *Milner* v. *Dep't of the Navy*, 562 U.S. 562, 569 (2011) (giving "personnel" in Exemption 2 its plain meaning); *Dep't of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (seeking "textual justification" for proposed interpretation of Exemption 5); *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to "read into the FOIA [language] that Congress did not itself provide"); cf. *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 383 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (describing the Court's repeated practice of "reject[ing] interpretations of * * * FOIA exemptions that diverge from the text").[9]

Interpreting Exemption 4 is a straightforward matter of statutory interpretation. "Confidential" has a well-defined ordinary meaning, and Congress did not provide a different definition when it enacted the statute in 1966. See 5 U.S.C. § 552. Both general-use and legal dictionaries at that time defined "confidential" as that which was private and not publicly disclosed. The term has not been susceptible to change—dictionaries before and after that period confirm that this meaning is both long-standing and universal:

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[9] All citations to *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383 (2015), in this brief are to this dissent from denial of certiorari, which was the only opinion in the case.

Noah Webster, An American Dictionary of the English Language 246 (Merriam 1852)	"[T]o be treated or kept in confidence; private; as, a *confidential* matter."
Black's Law Dictionary 370 (4th ed. 1951)	"Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret."
The Oxford Universal Dictionary on Historical Principles 367 (3d ed. 1955)	"Enjoying another's confidence; entrusted with secrets[.]"
1 Webster's New Int'l Dictionary 560 (3d ed. 1960)	"Communicated in confidence; of the nature of confidence; secret," a "communication in confidence of private matters[.]"
Webster's Seventh New Collegiate Dictionary 174 (1963)	"private; secret"
Black's Law Dictionary 370 (rev. 4th ed. 1968)	"Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret."

Ballentine's Law Dictionary 244 (3d ed. 1969)	*Confidential communications*: "Communications made in confidence; communications made to such persons that the law regards them as privileged beyond forcing a disclosure thereof."
Webster's Third International Dictionary 476 (1981)	"[N]ot publicly disseminated"; "conveyed [and] acted on * * * in confidence"
Black's Law Dictionary 339 (9th ed. 2009)	"[M]eant to be kept secret[.]"
Merriam-Webster Online Dictionary (2019)	"Communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : private, secret[.]"

This Court already has given "confidential" its ordinary meaning *when used in a FOIA exemption*. Congress used that same word in Exemption 7—just a few paragraphs after Exemption 4—and this Court authoritatively applied its common meaning in *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993).[10] In its decisions, this Court has consistently and over the course of many decades described what is "confidential" according to that term's plain meaning—private information that is not publicly disclosed.[11] In *Landano*, too, the Court did not

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[10] Exemption 7 permits the Government to withhold information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D).

[11] Thus, the requirement that census takers "take an oath not to

impose an unusual or hypertechnical definition, and even observed that the word "is not limited to complete anonymity or secrecy." *Ibid.* (citing Webster's Third New Int'l Dictionary 476 (1986)). And *Landano* construed "confidential" by contrasting it to *public* disclosure, just as it has done in non-FOIA cases:

> A statement can be made "in confidence" even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately.

Ibid. Consequently, "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *Id.* at 174. The Court rejected an alternative definition proposed by one of the parties, as it "relie[d] extensively on legislative history" to modify the word's ordinary meaning. *Id.* at 178.

Landano's construction of FOIA Exemption 7 reinforces a plain-text interpretation of "confidential" in Exemption 4. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994).

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disclose" certain information is what ensures the "confidentiality of data[.]" *Baldrige* v. *Shapiro*, 455 U.S. 345, 356 (1982). A "confidential" portion of a presentence report was one "not disclosed to defense counsel." *Gray* v. *Netherland*, 518 U.S. 152, 182 (1996) (internal quotation marks and citation omitted). Likewise, where a "report was a confidential document," it "should be shown to no one." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 534 (1961). Conversely, the presumption that marital communications are "confidential * * * may be overcome by proof of facts showing that they were *not* intended to be private." *Pereira* v. *United States*, 347 U.S. 1, 6 (1954) (emphasis added).

This Court has applied this principle to FOIA exemptions. It gave "personal privacy" the same plain meaning in both Exemptions 6 and 7(C). See *FCC* v. *AT&T, Inc.*, 562 U.S. 397, 407-408 (2011). And when the Court considered the definition of "personnel" in Exemption 2, it noted its previous plain-text definition when Exemption 6 used that term: Exemption 6 is "just a few short paragraphs down from Exemption 2," which justified the same definition in both places. *Milner*, 562 U.S. at 570. Exemption 4's use of "confidential" is "just a few short paragraphs" up from Exemption 7's use of that term, and it should be read the same in both places.

Notably, before *National Parks*, courts that interpreted Exemption 4 generally reached this same ordinary-meaning result and gave "confidential" its plain-text definition. *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971), for example, concluded that market shares and sales figures of certain products were "confidential" under Exemption 4, reasoning that the information was not customarily released by the submitter and the Government agency indicated it would treat the information as confidential. See also, *e.g.*, *Gen. Servs. Admin.* v. *Benson*, 415 F.2d 878, 881 (9th Cir. 1969) (agreeing that Exemption 4 is "meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential"). These cases were interpreting the same plain text: Congress has not changed Exemption 4's text or reenacted that statutory provision since its initial adoption in 1966.

Finally, if all of the above did not settle the question of what "confidential" means, ordinary use confirms the breadth of the term—that when Exemption 4 says "confidential" commercial or financial information obtained from a person, it means *all* such information that is kept

private and not publicly disclosed. 5 U.S.C. § 552(b)(4). For example, an attorney's duty of confidentiality extends to all of his client's information—not just information whose disclosure would "cause substantial competitive harm" (or "substantial litigation harm," or any other harm) to the client. See ABA Model Rule of Professional Conduct Rule 1.6. Likewise, someone who reveals her salary in confidence to an adviser would hardly be mollified if the adviser, after sharing that information with multiple acquaintances, brushed off the breach of confidence by pointing out that no substantial competitive harm was likely to result—no job loss, diminution of salary, foregone bonus, or inability to compete for new positions. Nor would anyone need to demand a definition of "confidential" to understand what was asked when told to "keep this confidential."

2. Legislative history only confirms the plain-text meaning

Given the long- and well-established definition of "confidential," there can be no meaningful dispute over what Congress meant when it used the word in Exemption 4. Accordingly, this Court need not consider legislative history. Regardless, the Senate and the House Reports accompanying the bill that became FOIA only confirm that Congress intended the plain-text meaning of "confidential." Cf. *EPA* v. *Mink*, 410 U.S. 73, 81 (1973) (consulting these reports in interpreting Exemptions 1 and 5); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 (1975) (consulting Senate Report to determine whether Exemption 5 applied).

The Senate Report explains that Exemption 4 gives federal agencies discretion to withhold non-governmental commercial or financial information that "would customarily not be released to the public by the person from whom it was obtained." S. Rep. 813, 89th Cong., 1st Sess.

9 (1965) (hereinafter S. Rep. 813). The House Report's definition is nearly identical: Exemption 4 "exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government." H.R. Rep. 1497, 89th Cong., 1st Sess. 10 (1965) (hereinafter H.R. Rep. 1497). This report also specifies that the exemption applies to "information which is given to an agency in confidence, since a citizen must be able to confide in his Government," and "where the Government has obligated itself in good faith not to disclose documents or information which it receives * * *." *Ibid.* These definitions corroborate that Congress said what it meant, and meant what it said, when using the term "confidential" in FOIA Exemption 4.[12]

* * *

The foregoing argument is sufficient to decide the case. But because Exemption 4 has long been burdened by the *National Parks* test that bears little resemblance to the statutory text, FMI now turns to that test and its numerous deficiencies.

B. The *National Parks* test is inconsistent with Exemption 4's text

The court below disregarded Exemption 4's plain text because the Eighth Circuit has adopted the atextual *National Parks* test for interpreting the statute. That was error.

1. National Parks *led the Circuits to an atextual interpretation of "confidential"*

a. In *National Parks*, the D.C. Circuit abandoned the plain text of Exemption 4. The court lamented—as if Congress could not *possibly* have meant what it said—that, "[u]nfortunately, the statute contains no definition of the

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[12] *National Parks*' use of much weaker legislative history is addressed in Part I.B.1, *infra*.

word 'confidential.'" 498 F.2d at 766. It then proceeded to fashion an erroneous, yet subsequently widely adopted, test for what is "confidential" under Exemption 4. In addition to being information that is not customarily disclosed by the submitter, the court imposed a second and *additional* requirement:

> commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted).

National Parks came from an era when many courts were less than rigorous about statutory text, and *National Parks* exemplifies this approach. It began by acknowledging precedents, like *Sterling*, that had adopted the plain text. *Id.* at 766. "In the past," the court acknowledged, "our decisions concerning [Exemption 4] have been guided by" the Senate Report described above, *supra* pp. 22-23, which accompanied the bill that became FOIA; this report confirmed the plain text by stating: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would *customarily not be released to the public by the person from whom it was obtained.*" 498 F.2d at 766 (quoting S. Rep. 813 at 9).

National Parks then sharply deviated from the D.C. Circuit's past practice. "Whether particular information would customarily be disclosed * * * is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of [Exemption 4]." *Id.* at 767.

The panel then decreed that "[a] court must *also* be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Ibid.* (emphasis added). This was not a minor tweak: "[T]he D.C. Circuit radically departed from prior judicial interpretations" of Exemption 4 that had relied on the plain meaning of "confidential." Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the* National Parks *Test*, 61 Geo. Wash. L. Rev. 1430, 1435 & n.29 (1993).

The court purported to find Exemption 4's legislative purpose not in the statute's text, but from a selection of statements made during a 1963 Senate subcommittee hearing. *National Parks*, 498 F.2d at 767-770. The bill then under consideration was "the predecessor of the bill which became law." *Id.* at 768. *That* unenacted bill, considered by the *prior Congress*, contained *no exemption* for trade secrets or commercial or financial information, and witnesses testified to the necessity of such an exemption. Several of them urged the inclusion of an exemption that would "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Ibid.*

Based on these statements, the court narrowed the unambiguous word "confidential" to confidential information whose disclosure is "likely to cause substantial harm to his competitive position." *Id.* at 770. The D.C. Circuit also held, based on the same legislative history excerpts, that information may be "confidential" based on the *Government's* interest (rather than private interests)—for instance, "if disclosure of the information is likely * * * to impair the Government's ability to obtain necessary information in the future." *Ibid.* It "express[ed] no opinion as to whether other governmental interests are embodied in this exemption." *Id.* at 770 n.17.

b. To put it mildly, *National Parks*' use of legislative history is at odds with this Court's precedents. *Weber Aircraft* rejected exploiting FOIA's legislative history to achieve policy goals beyond the plain text's reach:

> [T]he legislative history of [FOIA] Exemption 5 does not contain the kind of compelling evidence of congressional intent that would be necessary to persuade us to look beyond the plain statutory language.

465 U.S. at 802. The Court concluded the opinion this way: "We therefore simply interpret Exemption 5 to mean what it says." *Id.* at 804.

But even if legislative history *could* transcend unambiguous text, this Court—unlike *National Parks*—accords no significance to comments "not made by a Member of Congress" and not "included in the official Senate and House Reports." *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986). If legislative history is considered in interpreting Exemption 4, those official reports discussed above—not "passing references" from a hearing transcript—warrant greater weight.[13]

Moreover, even the snippets of testimony that the D.C. Circuit pulled from the Senate subcommittee hearing transcript do not support the substantial-competitive-harm test that the court ultimately formulated. Statements about a narrow problem that *may* have contributed to Exemption 4's eventual adoption—that is, the possibility that the Government might disclose competitively

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[13] *U.S. Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) (refusing to narrowly construe FOIA Exemption 6 based on isolated statements in the legislative history, particularly where the official Senate and House reports indicated that Congress intended the phrase "similar files" in that exemption to have "a broad, rather than a narrow, meaning" (quoting H.R. Rep. 1497 at 11, and citing S. Rep. 813)).

valuable information belonging to a private party—hardly prove that Congress intended the exemption to address *only* that specified problem.[14] At most, this testimony suggests that Congress would have been surprised if its exemption did *not* protect instances of substantial competitive harm. See *Weber Aircraft*, 465 U.S. at 800 (holding "that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the exemption—*not that all privileges not mentioned are excluded.*") (emphasis added).

National Parks disregarded both plain text and even clear legislative history in favor of some of the weakest legislative history imaginable—*witness* statements at a *subcommittee* hearing of a *prior* Congress about an *unenacted* bill. *National Parks* could be a casebook example of an oft-repeated critique of legislative history's misuse: "Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quotation and punctuation omitted).

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[14] Even if Congress's true and exclusive purpose *was* to protect parties from substantial competitive harm, protecting *all* confidential commercial information is a logical way to ensure that its purpose could not be defeated. That standard, reflected in the text, prevents "false negatives." After all, when the Government requested rehearing in *National Parks*, it pointed out that the Government expressed concern about errors because it is not intimately familiar with every business or industry from which it obtains information. Appellees' Pet. for Reh'g and Suggestion of Reh'g *En Banc* at 6-7, No. 73-1033. This very case illustrates why Congress would have wisely created a buffer zone *even if* it only cared about "substantial competitive harm."

2. National Parks *has been widely criticized—including by the court that invented it*

Unsurprisingly, therefore, *National Parks* has attracted prominent critics from the start.

After the panel issued its opinion, the Government unsuccessfully requested rehearing, noting its conflict with prior cases that gave "confidential" its plain meaning. Appellees' Pet. for Reh'g and Suggestion for Reh'g *En Banc* at 3-4, No. 73-1033 (filed May 28, 1974). It also issued a prescient warning about the new test's costs and risks. The Government receives information "of almost infinite variety from a multitude of firms and individuals engaged in business ventures of all types" with which it is not necessarily familiar, this creates "a high risk that the government will fail" to accurately meet the *National Parks* test—even where "competitive harm would indeed result from disclosure." *Id.* at 6-7. The decision was thus also "manifestly unfair to the many businesses and individuals who submit trade secrets, and commercial and financial information to the government in confidence." *Id.* at 7.

Several years later, D.C. Circuit Judge Randolph, joined by Judge Williams, again sounded the alarm and urged the court to revisit the test, decrying it as "fabricated, out of whole cloth." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), *vacated*, 942 F.2d 799 (1991). Judge Randolph pointed out that in "ordinary usage," the term "confidential" means "conveyed [and] acted on * * * in confidence" and "not publicly disseminated." *Ibid.* (quoting Webster's Third Int'l Dictionary 476 (1981)). He also criticized the judicially created "substantial harm test," observing that "[i]nformation not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than

objectively measurable harm." *Id.* at 948. "If this were a question of first impression," Judge Randolph wrote, "I would apply the common meaning of 'confidential' and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court." *Ibid.*

Following Judge Randolph's criticism in *Critical Mass*, the Government again sought—and this time obtained—rehearing *en banc*. It again argued that "confidential" should be restored to its "normal definition," and emphasized that over the past two decades "the *National Parks* test [had] proven to be both burdensome to the agencies and courts that must apply it and inherently unpredictable in its applications." Appellees' Pet. for Reh'g and Suggestion of Reh'g *En Banc* at 10, 14, No. 90-5120 (filed June 14, 1991).

A 7-4 D.C. Circuit majority upheld *National Parks*—but in a way that emphasized its displeasure with the atextual, yet "well established" test. *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 876-877 (D.C. Cir. 1992) (*en banc*). "Whatever our individual opinions as to the merits of the two-part test," the court stated, "we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that '*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 877 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)).[15]

The *en banc* court further repudiated the soundness of the *National Parks* definition of "confidential" by "confin[ing]" that definition to cases where the submitter was

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[15] As described in Part II, *infra*, even this defense of *National Parks* was mistaken. Asking whether information is "likely" to cause "substantial competitive harm" has led to unpredictable results and multiple circuit splits.

required to share information with the Government. *Id.* at 880. In so doing, it *rejected* the *National Parks* definition in the context of information *voluntarily* submitted to the Government, deeming it "confidential" and thus protectable when it would satisfy the ordinary definition—or, as the *en banc* court put it, if it "would customarily not be released to the public by the person from whom it was obtained." *Id.* at 878 (quoting *Sterling*, 450 F.2d at 709). In other words, when not constrained by *stare decisis*, the court gave "confidential" its dictionary definition—turning back to *Sterling*, the case that *National Parks* had disregarded.

To be clear, nothing in Exemption 4 turns on whether information is "voluntarily" provided to the Government—the exemption is categorical and the word "confidential" appears in it only once. In the D.C. Circuit, therefore, the *same word* means vastly different things *in its single appearance* in Exemption 4.[16]

Exemption 4 has thus far escaped this Court's review, but in 2015, two Members of the Court criticized *National Parks* in a dissent from the denial of certiorari. See *N.H. Right to Life*, 136 S. Ct. at 384-385. The dissent observed that this Court has "rejected interpretations of other FOIA exemptions that diverge from the text." *Id.* at 383. Notably, the Government—the party opposing certiorari in *New Hampshire Right to Life*—conceded "that every court that has adopted the *National Parks* definition of 'confidential' information has turned its back on the statutory text." *Id.* at 385 n.*.[17] At least for the time being, the

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[16] Additional inconsistencies across the country have appeared because most courts have not adopted this variation. Pet. 28-29.

[17] The Government again advocated giving "confidential" in Exemption 4 its ordinary meaning: "information that is 'not publicly disseminated' or that is 'communicated, conveyed, acted on, or practiced in confidence.'" U.S. Br. in Opp'n 9, *N.H. Right to Life* v. *Dep't of Health*

dissent regretted, denying certiorari "perpetuate[d] an unsupported interpretation of an important federal statute and further muddie[d] an already amorphous test." *Id.* at 385.

3. National Parks' *policy justifications cannot overcome the plain text*

a. While *National Parks* did not primarily defend itself based on FOIA's purported pro-disclosure purposes, that is often how it is defended—expressly or by implication. The court below, for example, worried that giving "confidential" its ordinary meaning might "swallow FOIA nearly whole." Pet. App. 4a n.4. *Of course* FOIA is pro-disclosure. "But no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). The FOIA exemptions express limits on FOIA's general purpose. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 525-526; accord, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

FOIA thus reflects a general philosophy of full agency disclosure "*unless* information is exempted under clearly delineated statutory language." *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994) (citation omitted) (emphasis added). Congress expressed limits in FOIA by enacting an entire subsection of exemptions—5 U.S.C. § 552(b). These are "limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Nat'l Archives & Records Admin. & Human Servs.*, No. 14-1273 (quoting Webster's Third New Int'l Dictionary 476 (1961) and citing H.R. Rep. 1497 at 10).

v. *Favish*, 541 U.S. 157, 172 (2004); see also, *e.g.*, *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982).[18]

FOIA's nine exemptions are consequently no less a part of the statute's design than its general-disclosure mandate. As this Court put it in *Milner* when discarding an atextual test in favor of a plain-meaning interpretation of Exemption 2, enforcing an exemption as written "gives the exemption the [meaning] Congress intended." 562 U.S. at 572. Just last year, the Court held that exemptions in the Fair Labor Standards Act must be given a "fair reading," not an unduly constricted one, as they "are as much a part of FLSA's purpose" as its other provisions. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018); see also, *e.g.*, *Weber Aircraft*, 465 U.S. at 798 ("The plain language of [Exemption 5] itself, as construed by our prior decisions, is sufficient to resolve the question presented.").[19]

Earlier this Term, the Court again reinforced that statutory limits are no less a part of a statute than its

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[18] Congress explained this duality in the legislative history (the part that this Court has routinely cited): that it had deliberately designed and negotiated a complex statutory framework balancing "the opposing interests" of freedom of information and "important rights of privacy with respect to certain information in Government files." S. Rep. 813 at 3.

[19] The Court has occasionally stated—and the Eighth Circuit repeated—that FOIA exemptions should be construed "'narrowly.'" Pet. App. 4a n.4 (quoting *Milner*, 562 U.S. at 565). But its holdings have always been to construe them *accurately*. Whatever else might be meant by a "narrow" construction, it does not mean a contra-textual construction or a construction that violates an exemption's plain meaning—and that principle explains *Milner* itself. See *infra* Part I.B.4 (discussing *Milner*'s rejection of extra-textual tests). *National Parks* construed Exemption 4 not "narrowly" but wrongly. As the Retail Litigation Center's certiorari-stage *amicus* brief shows, moreover, there is little reason for the Court to reiterate a FOIA-specific narrow-construction canon that can only confuse lower courts.

larger purpose. In *New Prime*, a litigant had invoked the Federal Arbitration Act's undoubtedly pro-arbitration purposes to enforce an arbitration agreement—despite the particular agreement escaping that statute's plain text. If this case's parties and FOIA are substituted in for the Arbitration Act, the analysis in *New Prime* applies equally here:

> Unable to squeeze more from the statute's text, [Argus Leader] is left to appeal to its policy. * * * But often and by design it is hard-fought compromise, not cold logic, that supplies the solvent needed for a bill to survive the legislative process. * * * If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to take account of legislative compromises essential to a law's passage and, in that way, thwart rather than honor the effectuation of congressional intent. By respecting the qualifications of [Exemption 4] today, we respect the limits up to which Congress was prepared to go when adopting the [Freedom of Information Act].

New Prime, 139 S. Ct. at 543.

b. Appeals to policy are also misguided. FOIA will hardly cease to serve its larger purpose if Exemption 4 is applied as written.

FOIA's purpose, in part, is to contribute to "public understanding of the operations or activities *of the government*." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (citation omitted). Exemption 4 plays a discrete and important role in this scheme: it shields from mandatory disclosure "confidential" information that is "commercial or financial" and that the Government has obtained from non-governmental third parties. Even then, it does not drain the Government of all discretion to disclose the information if

it determines that doing so is appropriate and not contrary to other law. 5 U.S.C. § 552(a)(8), (b)(4).

Indeed, instead of *furthering* the purposes of FOIA in increasing transparency regarding governmental activities in certain areas, decreasing the protection Congress provides for non-governmental information has created a troubling anomaly. Although FOIA seeks to improve *public* understanding of *the Government*, in practice, commercial for-profit interests have dominated FOIA requests and lawsuits. Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1380-81 (2016). One recent empirical study of selected agencies observed the "relative paucity of news media requests," and concluded that "at the studied FOIA offices, the staff and resources are primarily serving commercial interests, not the public's interest in knowing what its government is up to." *Id.* at 1381. At the Defense Logistics Agency, for example, 96% of all requests were made by commercial entities; fewer than 1% of requests came from the news media. *Id.* at 1401. Interestingly, the study revealed that a disproportionate number of FOIA requests come from information resellers—that is, commercial entities who request information from the Government and then offer the information as part of a subscription service. *Id.* at 1381.

Then-Professor Scalia was prescient about this point. FOIA and subsequent amendments, he explained,

> were promoted as a means of finding out about the operations of government; they have been used largely as a means of obtaining data in the government's hands concerning private institutions. They were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers.

Antonin Scalia, *The Freedom of Information Act Has No*

Clothes, 5 Regulation 14, 16 (1982).

c. Of course, FMI, Argus Leader, *amici*, and even Members of this Court may disagree about what policy FOIA *should* pursue, and the best means it could adopt to do so. But "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018). As this Court said in another FOIA exemption case: "If the public interest suffers by reason of [exemption from disclosure], the remedy is for Congress to require [disclosure]." *Renegotiation Bd.* v. *Grumann Aircraft Eng'g Corp.*, 421 U.S. 168, 191 (1975) (Exemption 5).

Importantly, Congress enacted an Exemption that provides categorical protection for all confidential commercial information that was obtained from a person. If Congress instead intended the court to balance competing interests in deciding whether confidential information could be withheld, it would have said so—just as it did in several other FOIA Exemptions.[20] Similarly, if Congress intended to protect only confidential information whose disclosure would cause substantial competitive harm, instead of protecting *all* confidential commercial information, then it could easily have said that, too. This is not just by hypothesis—Congress has on several occasions explicitly restricted the disclosure of confidential information whose disclosure would cause competitive or other

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[20] *E.g.*, *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1982) ("unwarranted invasion of personal privacy" standard in Exemption 7(C) generally requires a balancing test); *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (Exemption 6's "clearly unwarranted invasion" of personal privacy standard requires a balancing "of the public interest in disclosure against the interest Congress intended the exemption to protect.").

types of harm.[21]

"Confidential" in Exemption 4 means confidential—nothing else. The purpose of protecting confidentiality or the expected results of confidentiality's violation are separate inquiries grounded in Congress's policy choices. The D.C. Circuit had no authority to circumvent the language that Congress chose to reflect its independent judgment.[22] This Court should interpret the law according to its terms, and let Congress respond if in its view conditions today warrant the substantial-competitive-harm test—or some other test entirely.

4. No other arguments support retaining National Parks' *atextual and unworkable reading of Exemption 4*

Without text, legislative history, or policy, what else could justify retaining *National Parks*? The *en banc* D.C. Circuit cited three reasons that—despite its obvious discomfort with the substantial-competitive-harm definition,

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[21] *E.g.*, 2 U.S.C. § 603 (1974) ("commercial information • • • obtained by the Government on a confidential basis • • • [that] is required to be kept secret in order to prevent undue injury to the competitive position of such person"); 42 U.S.C. § 5413 (1974) (information "which • • • if disclosed, would put the person furnishing such information at a substantial competitive disadvantage, shall be considered confidential"); 15 U.S.C. § 4019 (1982) (prohibiting disclosure of commercial information "if the information is • • • confidential and if the disclosure of the information would cause harm to the person who submitted the information").

[22] The second prong of the *National Parks* test— information is "confidential" if its disclosure would be likely "to impair the Government's ability to obtain necessary information in the future," 498 F.2d at 770—is not at issue in this case but fares no better on plain-text review. Whether particular information is confidential cannot, as a matter of logic, depend on the distinct inquiry whether its disclosure would threaten the Government's ability to obtain other information in the future.

see *supra* Part I.B.2.b—led it to apply *stare decisis*: (a) other Circuits' adoption of *National Parks*; (b) Congress's supposed cognizance of that case; and (c) the conclusion that the test had not proven "so 'unworkable' in practice as to constitute a 'positive detriment to coherence and consistency in the law.'" *Critical Mass*, 975 F.2d at 877-878.

Principles of *stare decisis*, of course, do not bind this Court's review of lower courts' erroneous statutory interpretations. Regardless, the justifications that led the D.C. Circuit to retain *National Parks* have proven wholly inadequate.

a. Broad use of *National Parks* cannot overcome that precedent's utter infidelity to the statutory text. "[*T*]*his* Court's responsibility [is] to say what a statute means," and lower courts then must "respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). In FOIA, as in many other contexts, this Court has rejected longstanding and widely shared—yet atextual or otherwise erroneous—statutory interpretations.

Milner, for example, abrogated extratextual tests for FOIA Exemption 2 that the D.C. Circuit had developed, replacing them with a plain-text interpretation of the exemption based on dictionary definitions of "personnel." 562 U.S. at 579-580 (abrogating *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*)). "Our consideration of Exemption 2's scope starts with its text," the Court explained, regardless of whether an atextual decision had become entrenched in the courts below. *Id.* at 569; see also, *e.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191, 196 (1994) (rejecting dissent's argument that a widespread, previously "settled construction * * * should not be disturbed" and replacing a broadly adopted lower-court interpretation of aiding-and-abetting

liability in securities actions with a plain-text interpretation).

Accordingly, the significance that the *en banc* D.C. Circuit accorded to the fact that several Circuits had adopted, while none had rejected, *National Parks*, is immaterial here. *Critical Mass*, 975 F.2d at 876. Moreover, even that perception was and remains misleading. The widespread adoption of *National Parks* is attributable to other lower courts' deference to the D.C. Circuit in this area of the law—not the result of each Circuit's careful, reasoned, and independent analysis of the test and its merits. With one exception,[23] the other Circuits to have adopted *National Parks* have done so reflexively and without engaging in critical analysis,[24] taking its test as a given, and the D.C. Circuit alone has considered it *en banc*—with the less-than-enthusiastic result described above, see *infra* Part I.B.2.b.

b. The D.C. Circuit also erred when it implied that Congress has approved of *National Parks* and when it

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[23] *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983).

[24] See, *e.g.*, *Cont'l Stock Transfer & Tr. Co.* v. *S.E.C.*, 566 F.2d 373, 374 (2d Cir. 1977) (per curiam); *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000) (adopting *National Parks* after labeling it the "leading case"); *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190, 1207 n.68 (4th Cir. 1976) (same); *Cont'l Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975) (same); *Gen. Elec. Co.* v. *U.S. Nuclear Regulatory Com'n*, 750 F.2d 1394, 1398 (7th Cir. 1984) (applying *National Parks* test without analysis, though noting that Exemption 4 is, "literally," broader); *Madel* v. *U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015) (reciting and applying the elements of the *National Parks* test); *Pac. Architects & Eng'rs Inc.* v. *U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990) (same); *Anderson* v. *Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990) (same); *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x. 284, 290 (11th Cir. 2007) (same).

indicated that this justified preserving the test (at least in modified form, given the "voluntary" proviso just described). Exemption 4 has remained unchanged since 1966; Congress has neither amended nor reenacted it. The only relevant question, therefore, is what Congress meant when it enacted that statutory provision. See *New Prime*, 139 S. Ct. at 543. Exemption 4's plain text, not *National Parks*, definitively resolves that question. *Supra* Part I.A.

Critical Mass suggested the opposite by citing the legislative history of a different and later-enacted statute—the Open Meetings Act of 1976. 975 F.2d at 876-877 (citing *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1153 n.146 (D.C. Cir. 1987))). Language in that separate Act mirrored Exemption 4, and a Member of Congress commented that this language was "as interpreted in cases such as *National Parks*." *CNA Fin. Corp.*, 830 F.2d at 1153 n.146 (quoting 122 Cong. Rec. 24, 181 (1976)). But the Conference Report did not mention *National Parks*—it reported that "conferees have agreed to this language with recognition of judicial interpretations of that exemption." *Ibid.* (quoting H.R. Rep. No. 1441). In 1976, the ink was still barely dry on *National Parks*, which was not the only judicial interpretation of Exemption 4 and recognized in only two other Circuits. Moreover, as even the D.C. Circuit candidly acknowledged, this legislative history about the Open Meetings Act "of course [does] not shed[] any light on the intent originally underlying enactment of Exemption 4 of FOIA." *Ibid.*

Argus Leader has relied on other legislative history from after FOIA's passage to suggest that Congress has acquiesced in *National Parks*. It posited that Congress blessed the *National Parks* test in a 1978 committee report. BIO 16. That report came from a House committee—hardly both Houses of Congress after presentment to the President. Moreover, the report did not bless *National Parks*, but expressly stated the opposite: that the

committee was "not prepared at this time to consider the merits of the substantial comparative harm test." *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. 1382, 95th Cong., 2d Sess. 22 (1978).

Instead, the subcommittee that prepared the report "limited its review primarily to the procedures used by agencies and by courts in deciding cases involving business information under exemption 4," *id.* at 12, and the report noted that the underlying hearings did not "delve deeply into the scope of exemption 4," *id.* at 22. In all events, the opinion of a House committee regarding the meaning of statute enacted by a different Congress over a decade earlier is at best an unreliable tool to interpret the meaning of the language Congress used to enact FOIA in 1966. See, *e.g.*, *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring).

c. Finally, *National Parks* has proven to be increasingly unworkable. In its *Critical Mass* petition for rehearing *en banc*, the Government explained that "[d]ozens of federal agencies as well as the courts now devote substantial resources to analyzing whether agency records contain information that is confidential under the *National Parks* test." Pet'n for Reh'g at 3, No. 90-5120. "The burdens imposed by the *National Parks* test needlessly drain administrative and judicial resources in an area of the law in which the Supreme Court has repeatedly referred to Congress' intent to create workable rules." *Ibid.* *Critical Mass* itself "dramatize[d] the practical shortcomings of the *National Parks* test," as the case was being remanded to the district court *for the third time* so that court could hear additional evidence regarding whether Exemption 4 applied. *Id.* at 12.

Even if this Court were to consider the workability of the *National Parks* test in giving authoritative

construction to "confidential," *Critical Mass*'s conclusion in 1992 that the test was not so unworkable in practice as to justify its abandonment, 975 F.2d at 877, is clearly wrong today. The ten Circuits that have now adopted the substantial-competitive-harm test from *National Parks* are unable to consistently apply it. Courts' efforts to parse the D.C. Circuit's language, rather than the statute itself, have yielded splits on every facet of that test. See *N.H. Right to Life*, 136 S. Ct. at 383-385 (dissent describing the *National Parks* test as "nebulous," "convoluted," and "amorphous," with "different limits in different Circuits"). The result is that at least five splits currently divide the Circuits, including regarding what constitutes a likelihood of substantial competitive harm; what kind of actual competition must be shown; whether actual competition can be demonstrated based on possible competition from a hypothetical future competitor or requires a current competitor already participating in the relevant market; whether bad publicity or embarrassment in the marketplace is the type of competitive harm against which Exemption 4 protects; and whether a different test applies to information that a person was obliged to furnish to the Government than to information that was voluntarily provided to the Government. See Pet. 25-29 (collecting cases).[25] A test that purports to unify the Circuits but generates such subsidiary conflict is proof of *un*workability.

The reigning unpredictability flows directly from adopting *National Parks*—and the seeming unity of Circuits adopting this test masks vast disarray. It takes 43 pages for the Department of Justice's guide to Exemption 4 to explore dozens of opinions that have applied the

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[25] The certiorari petition in this case, the certiorari-stage Alliance of Marine Mammal Parks & Aquariums *Amicus* Br. 5-11 and Chamber of Commerce *Amicus* Br. 5-9, and the dissent in *New Hampshire Right to Life* have detailed these and additional divisions.

substantial-competitive-harm test, including cataloguing courts' varying approaches, and the different outcomes that courts facing similar fact patterns have reached.[26] Without guidance from Congress or this Court, and attempting to apply the nebulous *National Parks* test, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines."[27] Repudiating *National Parks* and adopting the plain text would instantly eliminate that confusion.

The *National Parks* test also imposes substantial costs on courts, federal agencies, submitters, and requesters of information. If the agency withholds information under Exemption 4 and the requester pursues disclosure in court, the court must review evidence to make a necessarily speculative determination about the potential consequences a particular party of releasing certain information in the context of a specific industry. As *amici* in this case have demonstrated, these procedures are expensive, resource-intensive, time-consuming—and still

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[26] See U.S. Dep't of Justice Guide to the Freedom of Information Act at 305-347 (2014), available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf (collecting cases). As further evidence of *National Parks*' systemic unpredictability, even panels within the same Circuit, reviewing the same facts, have been unable to apply consistently the substantial-competitive-harm test. *E.g.*, *id.* at 309 (reporting a case in which the D.C. Circuit originally affirmed the district court's determination that Exemption 4 applied but, upon reconsideration following a panel member's death, reversed and remanded on the same record—and observing that this case "well illustrate[s]" the "individualized and sometimes conflicting determinations indicative of competitive harm holdings" (citing *Greenberg* v. *Food & Drug Admin.*, 775 F.2d 1169, 1172-1173 (D.C. Cir. 1985), and *Greenberg* v. *Food & Drug Admin.*, 803 F.2d 1213, 1215, 1219 (D.C. Cir. 1986)).

[27] *Id.* at 309.

sometimes yield the wrong result.[28]

FOIA exemptions "were plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. *National Parks*' inability to generate consistent, predictable outcomes thus provides further evidence that *National Parks* has been wrong all along. Whether a private party's information must be released by the Government under Exemption 4 currently "rests on judicial speculation about whether disclosure will cause competitive harm." *N.H. Right to Life*, 136 S. Ct. at 384. This Court should not permit *National Parks* to continue its wasteful reign.

C. The data that Argus Leader requested is "confidential" information that can be withheld under Exemption 4

The data that Argus Leader requests fits easily within the ordinary definition of "confidential." Argus Leader has not disputed that retailers carefully safeguard this information or that USDA represented to retailers that it would keep such information confidential pursuant to the agency's longstanding policies. This should not have been a close case, let alone one requiring a trial.

The witnesses uniformly testified at trial that retailers do not publicly disclose store-level SNAP-redemption data and indeed protect it from disclosure. Pet. App. 11a-12a, 88a-89a. As one retailer representative explained, store-level SNAP data is "not something that we disclose or publish. It's not something that's publicly available *in any way*." JA94 (emphasis added). Such information is "personal, confidential, proprietary information to our

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[28] *E.g.*, National Association of Convenience Stores *Amicus* Cert. Br. 14-23; Alliance of Marine Mammal Parks & Aquariums *Amicus* Cert. Br. 11-19; Chamber of Commerce *Amicus* Cert. Br. 10-17.

business, for internal business decisions only." Reporter's Record I:175. As another witness put it, the amount of SNAP sales at any given store is "absolutely" kept private. JA98.

The uncontroverted evidence also demonstrated that the custom of non-disclosure is not limited to the retailers whose representatives testified at trial. USDA's witnesses agreed—and Argus Leader's witnesses did not dispute—that store-level SNAP data is not disclosed in the food-retail industry as a whole, and that this information cannot currently be obtained on the market. JA96, JA98; Reporter's Record II:368-369; *Ctr. for Pub. Integrity* v. *U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 63 (D.D.C. 2018) (relying on declaration that information was routinely protected and would not be released to conclude it was customarily kept confidential for purposes of Exemption 4).

Retailers also testified that they took measures to *protect* the store-level data. See *McDonnell Douglass Corp.* v. *EEOC*, 922 F. Supp. 235, 242 (E.D. Mo. 1996) (reverse-FOIA case relying in part on parties' measures to guard their information, like limiting access to information even within the corporate structure, to conclude information was customarily kept confidential). One retailer described extensive information security training for employees, a closed campus, and computer-network security measures implemented to keep financial data private, specifically including store-level SNAP sales data. JA93-94. Another explained that access to SNAP sales data was limited to "a very tight group of the senior management team." JA98; see also Reporter's Record II:393 (testimony by USDA's expert that disclosure of this information would be a "windfall" to competitors because it is not otherwise available on the market); JA96 (testimony by National Grocers Association President that retailers limit sales data "to as few people as possible within their organization due to the confidential nature of that information").

The EBT processors' contracts provide that those intermediaries shall "treat all information, and in particular information relating to retailers * * * as private or confidential information, as provided under [USDA regulations,] and shall restrict access to and disclosure of such information in compliance with federal and state laws and regulations." Def's Tr. Ex. 202 at 74-75. As such precautions illustrate, JA96, the industry prizes the security of this information, which is why FMI continues to pursue its protection.

The retailers also reasonably expected that the information would be kept confidential even after it was submitted to the Government, based on the Government's representations and course of conduct. USDA's longstanding and public interpretation of the Food Stamp Act was that 7 U.S.C. § 2018 barred the agency from releasing SNAP retailers' redemption information. See *supra* pp. 5-6. The restrictions on disclosure of this information are such that Congress found it necessary to amend the Food Stamp Act to authorize state and local law enforcement to access that data. See H.R. Rep. 271, 99th Cong., 1st Sess. 155 (1985); H.R. Rep. 352, 103d Cong., 1st Sess. 5 (1993).[29]

Andrea Gold, USDA's Retailer Policy and Management Division Director for SNAP, summarized USDA's approach—and the submitters' reliance on it—in an

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[29] After the Eighth Circuit issued its Exemption 3 decision in this case, see *supra* p. 7, Congress amended the Food and Nutrition Act of 2008 again to make its protection of redemption information even more unambiguous, clarifying that retailers submit this data *through* the EBT processor. Agriculture Improvement Act of 2018, Pub. L. 115-334, December 20, 2018, 132 Stat. 4490 (amending § 2018 "in the 1st sentence of subsection (c) by inserting 'records relating to electronic benefit transfer equipment and related services, transaction and redemption data *provided through the electronic benefit transfer system*,' after 'purchase invoices.'" (emphasis added)).

affidavit to the District Court:

> [T]he agency has had a long-standing policy regarding treatment of this data as confidential under 7 C.F.R. § 278.1(q). As retailers participating during the period for which data has been requested did so under the expectation that such data would be protected, and because they are unable to opt out retrospectively, this data will not be released.

JA71-72; see also 79 Fed. Reg. 45,175 ("Throughout the history of [SNAP]," the Government "has operated in accordance with its interpretation of the Act and FNS regulations that the Secretary did not have authority to release this information."). The President of the National Grocers Association confirmed that "when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released." JA97; see also JA94-95 (similar testimony by retailer representative).

When Exemption 4 is correctly interpreted, it is evident that the information at issue in this case is "confidential." It is not subject to mandatory disclosure under FOIA, and USDA may withhold that information.

II. Even Under *National Parks*' Atextual Test, The Eighth Circuit's Standard For Substantial Competitive Harm Is Erroneous

In *National Parks*, the D.C. Circuit concluded that applying Exemption 4 required an inquiry into "the possibility that disclosure will harm legitimate private * * * interests in secrecy." 498 F.2d at 770. But in the decades since, lower courts interpreting *National Parks* have lost sight of that broad interest. Instead, they have become focused on parsing *National Parks*' language regarding substantial competitive harm, and have developed increasingly burdensome and case-specific requirements to meet that

test. Ultimately, the *National Parks* test, in many Circuits, fails to reliably protect businesses and individuals from harmful disclosure of their information, even as it imposes costly litigation burdens on the courts, government agencies, submitters, and requesters.

The simplest response is scuttling the substantial-competitive-harm test altogether. Short of that, the Court should resolve the inter-circuit (and sometimes intra-circuit) confusion by holding that the test requires only a broad inquiry assessing whether there is a reasonable possibility that commercial or financial interests may be injured, directly or indirectly, by the release of submitted information. In the context of a business, this would ask merely whether there is a reasonable possibility that disclosure will divert sales or profits. While this approach is less capable of uniform application and efficient administration than simply following the plain text of Exemption 4, it would at least allow the federal courts to jettison decades of arbitrary judicial limitations on (1) the sources of harm, (2) the types of harm, and (3) the types of proof permitted. It would also align the standard more closely with what must be shown under, for example, the Robinson-Patman Act to establish substantial competitive injury.

A. Evidence of a reasonable possibility that disclosure might harm commercial or financial interests should satisfy the *National Parks* test

As even *National Parks* acknowledged, Congress intended Exemption 4 to protect the interests of submitters, not just those of the Government. 498 F.2d at 770. The D.C. Circuit summarized the submitters' legitimate interests as avoiding "substantial harm to the[ir] competitive position." *Ibid.* The court charged the district court on remand, however, with a broader inquiry "into the *possibility* that disclosure will harm legitimate private or

governmental interests in secrecy." *Id.* at 770 (emphasis added). Though some courts have understood that *National Parks* did not mandate "a sophisticated economic analysis of the likely effects of disclosure," *Public Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983), others have narrowly and rigidly parsed what constitutes a likelihood of "substantial competitive harm"—resulting in numerous circuit splits. Pet. 24-31.

Clarifying that the *National Parks* test is met when there is a reasonable possibility of financial or commercial harm—which, in the context of a business, means the possibility of diverted sales or profits—would facilitate uniform application. This proposed test is neither novel nor difficult in application. This Court has recognized a similar "reasonable possibility" test when applying the Robinson-Patman Act, which examines whether there is a reasonable possibility that "substantial competitive injury" may occur. *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 222 (1993). Under that test, "[a] hallmark of the requisite competitive injury * * * is the diversion of sales or profits." *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006).

A test asking merely whether there is a reasonable possibility that disclosure will divert sales or profits is unlikely to be misapplied by well-meaning government officials—who are tasked with defending confidential information submitted by industries in which they have no or limited expertise (certainly as compared to the submitters themselves). Plus, this test would ease the administrative burden on the Government and courts. It will reduce the substantial expense submitters and requesters incur by eliminating uncertainty, minimizing the wrangling of witnesses and testimony, and ending the carousel of appellate second-guessing.

1. The proposed standard does not require the Government to prove that a defined competitive harm must *immediately* result from a competitor's use of submitted information. Instead, as the First and Tenth Circuits have held, a competitor's *possible* use of the information to cause harm threatens the submitter's interests and satisfies Exemption 4. *N.H. Right to Life*, 778 F.3d 43, 51 (1st Cir. 2015) (rejecting a "myopic" view of competition); *State of Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970-971 (10th Cir. 2001).

In turn, the Court should disapprove any requirement for demonstrating a precisely defined competitive harm, as demanded by the Eighth, Ninth, and D.C. Circuits. *E.g.*, *McDonnell Douglas Corp.* v. *U.S. Dep't of the Air Force*, 375 F.3d 1182, 1192 (D.C. Cir. 2004); *GC Micro Corp.* v. *Defense Logistics Agency*, 33 F.3d 1109, 1114-15 (9th Cir. 1994); Pet. App. 5a.

2. Second, a broad inquiry recognizes the reality that actors beyond present competitors can cause competitive harm to a submitter. Information, once disclosed, may be used by future competitors just as well as present ones. If such a threat is reasonably possible, there is no principled reason why the submitter facing this threat should be barred from Exemption 4's protection—as the First, Eleventh, and D.C. Circuits have already acknowledged. *E.g.*, *N.H. Right to Life*, 778 F.3d at 51; *Sharkey* v. *FDA*, 250 F. App'x 284 289-290 (11th Cir. 2007); *People for the Ethical Treatment of Animals* v. *U.S. Dep't of Health & Human Servs.*, 901 F.3d 343, 351-352 (D.C. Cir. 2018).

Similarly, a reasonable probability of harm exists, and thus Exemption 4 should apply, when customers, vendors, or the public may be able to use submitted information in a way that injures the submitter. See, *e.g.*, *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 306-307 (D.C. Cir. 1999) (accepting as competitive harm the prospect that a

customer will use released information to improve its bargaining position against the submitter). It makes little sense to cabin the concept of substantial competitive harm solely to present market competitors, as the D.C. Circuit has inconsistently done. See, *e.g.*, *Public Citizen Health Research Grp.*, 704 F.2d at 1291 n.30.

3. A broad inquiry also should not discriminate between types of harm that may result from releasing submitted information. Injury to reputation or a loss of public confidence in a submitter can divert sales or profits just as easily as another competitor building more stores in a retailer's area. Indeed, some FOIA requests are submitted *for the purpose* of embarrassing the submitter or causing political interference, as in *Nadler* v. *FDIC*, 92 F.3d 93, 96 (2d Cir. 1996). As that court recognized: "The fact that this harm would result from active hindrance by the Plaintiffs rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four." *Id.* at 97. Undermining a business in these ways harms its competitive position just as effectively, if slightly less directly.

4. Finally, a broad competitive-harm standard should encompass external indicia of competitive harm. Those indicia include whether and at what cost the information could be obtained or derived, and whether the submitter took measures to protect its confidentiality. See *Worthington Compressors, Inc.* v. *Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) ("If private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure of that information through the FOIA conduit could damage the competitive position of the submitters, to the advantage of FOIA requesters."); *Sharkey*, 250 F. App'x at 290 (drastic measures taken by the submitter to keep information confidential supports a conclusion that information is confidential).

B. Under an objective application of *National Parks*, the SNAP data clearly falls within the ambit of Exemption 4

USDA's evidence at trial should have been more than sufficient to demonstrate that there was a reasonable possibility that releasing the SNAP data could injure the competitive position of at least some of the submitting retailers. USDA's expert witness guided the district court step-by-step through his process of using the real sales figures at issue to create a statistical model for analyzing retail market positioning. Reporter's Record I:393-400. The expert testified that the SNAP data would be a "windfall" for retail analytics firms like his, and thus for the retailers with deep enough pockets to hire such statisticians. *Id.* at II:393.

Under a broad inquiry into competitive harm, no additional testimony was required. But USDA's fact witnesses also testified to four distinct ways competitors could use the SNAP data to cause substantial competitive harm.

First, stores revealed to have a high rate of redemptions expected to see increased competition from their existing competitors, as those competitors adjust their product selection and marketing to attract SNAP customers. Reporter's Record I:224; *id.* at II:324.

Second, new market entrants—especially those whose strategy involves targeting price-conscious shoppers—will use the SNAP data to reveal the best locations from which to lure away incumbent retailers' customers. Andrew Johnstone of Kmart testified that if foreign grocer Lidl—which seeks to attract price-conscious shoppers and has "announced very publicly plans to build hundreds of new stores in the United States"—knew Kmart's SNAP sales at the store level, "I think you can be pretty sure where they would start putting their stores." *Id.* at I:252-253. David Siebert of Supervalu/Save-A-Lot similarly

explained that releasing SNAP redemption data would allow a market entrant "to better identify where they see opportunity to enter the market and take a portion of those food dollars." *Id.* at II:309.

Other new market entrants include online grocers, such as Amazon, that are increasingly competing with traditional grocers. Reporter's Record I:208. In the time since trial, USDA has announced a pilot program to allow online retailers to participate in SNAP.[30] Online retailers will be perfectly poised to reap the upside of a massive data release and will be asymmetrically benefited over traditional retailers by such a release, both because the online retailers have no data included in the current FOIA request and because they will *never* have store-level data to release.

Third, the retailers uniformly expressed their fears that SNAP redemption data will allow data analysts to better estimate total sales volume. As one retailer testified: "[I]f you knew what percentage of my sales was paid for in SNAP benefits, you could come to a rough estimate, a better estimate, let me put it that way, of what our store's sales are, and determine if you think there's more for you to get from us." Reporter's Record I:192. USDA's expert witness confirmed the retailers' fears: he knew precisely how to use the SNAP data to give his data analysis a competitive edge. *Id.* at II:394-395.

Lastly, retailers raised the specter that releasing SNAP data may draw negative attention and generate an unfair stigma around shopping at a particular store. Reporter's Record I:194; *id.* at I:212. If particular locations gain notoriety as high-SNAP stores, other customers may wish to avoid being tagged with the same stigma, or

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[30] SNAP Online Purchasing Pilot, https://www.fns.usda.gov/snap/online-purchasing-pilot (last accessed Feb. 15, 2019).

landlords may hesitate to continue a tenancy. *Id.* at I:212. The harm this stigma could cause is every bit as real as the harms inflicted by a competitor; there is no jurisprudential reason to distinguish between the two.

To refute this testimony, Argus Leader put on only two expert witnesses. An assistant agribusiness professor agreed that it would be wrong to characterize the SNAP data as having "no value," and conceded that its release "could cause some harm to some retailers," but maintained that the harm would be "very limited and very unlikely." Reporter's Record II:348; *id.* at II:351; *id.* at II:362. A professor of business administration testified that large retailers devote entire departments to data analytics, but then claimed that the risk of substantial competitive harm was nonetheless low because retailers already make decisions based on their own and publicly available data. *Id.* at II:375-378.

Straightforward application of a broad competitive harm test reveals there is a reasonable possibility that competitors could use store-level SNAP redemption data in ways resulting in harmful diversion of sales or profits. Having exhausted its expertise, the district court should have ended its inquiry there. SNAP data is the type of information that Exemption 4 and even the substantial-competitive-harm test are meant to protect.

* * *

This litigation exemplifies many of the worst tendencies of the lower courts applying *National Parks*, and it demonstrates the need for an improved, streamlined test for competitive harm. The district court required a hyper-precise showing of exactly how a competitor could use SNAP data, ignored harms caused by negative publicity instead of by competitors directly, and resulted in a two-day bench trial with a bevy of government, retailer, and expert witnesses.

The Eighth Circuit even acknowledged that the SNAP data "might prove useful" and would improve statistical modeling efforts. Pet. App. 5a. But "without more," the panel concluded that the "highly competitive" grocery industry would be unaffected by "marginal improvement[s]." The Eighth Circuit treated all 321,000 retailers as one industry-wide monolith, assuming that a small improvement in competitiveness will be equally distributed across competitors. And the court refused to grapple with the fact that a "marginally more accurate" statistical model in the undisputed extraordinarily competitive world of retail grocers can be the difference between a red and black ledger. The Court should eliminate the *National Parks* test altogether—but if it does not, it should direct that it be applied in the simple, objective manner proposed here.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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APPENDIX

5 U.S.C.A. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * *

(8)(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted

invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act exempts from the statute's disclosure obligation "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). The Eighth Circuit determined that Exemption 4 does not shield from release information generated and compiled by the Government regarding the amounts of federal money disbursed to food retailers under the Supplemental Nutrition Assistance Program.

The questions presented are:

1. Should Exemption 4, which permits agencies to withhold confidential commercial information, be read to require competitive harm, where that requirement is consistent with the common-law understanding of "confidential commercial information," and where Congress has repeatedly ratified the lower courts' uniform reading of the exemption to require such a showing?

2. Should this Court modify the longstanding competitive-harm standard to require only a mere possibility of harm?

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INTRODUCTION

This Court granted review to examine Exemption 4 of the Freedom of Information Act. But the case took an unexpected turn when the Solicitor General filed its brief in this Court. That brief raises substantial questions regarding petitioner's Article III standing—in particular, whether a ruling by this Court on Exemption 4 would redress petitioner's alleged injury.

The Solicitor General correctly explains that FOIA exemptions do not bar the Government from exercising discretion to disclose. The Solicitor General thus rightly continues that, even if this Court rules for petitioner, and holds that FOIA Exemption 4 (5 U.S.C. §552(b)(4)) applies to the requested information, that ruling would *not* bar the agency, the Department of Agriculture, from disclosing the information. And the brief now announces for the first time that, even if this Court rules that Exemption 4 applies, USDA *would* in fact affirmatively exercise any discretion it has to disclose the requested information.

But in a final, unforeseen move, the Solicitor General reports that, although USDA would exercise its discretion to disclose, the agency believes it lacks such discretion for one reason alone: It interprets another statute, 7 U.S.C. §2018(c), to forbid disclosure.

To have standing, petitioner must show that prevailing on Exemption 4 in this Court is *likely* to redress its claimed harm. It cannot make that showing when USDA has declared that it would exercise its

discretion to release, regardless of whether Exemption 4 applies. And although USDA resists disclosure under another statute, that position is untenable. The Court of Appeals rejected USDA's reading of that statute in this very case; no party sought this Court's review of that ruling; and, in any case, the Court of Appeals was plainly correct. Accordingly, USDA is free to carry out its announced decision to release the information at issue on a discretionary basis.

If the Court reaches the merits of Exemption 4, it should affirm. For 40 years, the courts of appeals have uniformly read the exemption for trade secrets and confidential commercial information to require a showing of likely competitive harm upon disclosure. Now, citing selective excerpts of dictionary definitions of "confidential," petitioner claims there is only one way to read the plain text: to cover anything the private-party source of the information treats as confidential. However, dictionaries, as well as common parlance and numerous other sources of interpretive guidance, show that "confidential" often means information that is confidential *in nature* based on objective harm of disclosure. That is how "confidential" commercial information is properly read here.

While dictionaries do not definitively tell us how to read Exemption 4's reference to confidential commercial information, the common law does. The common law extended protection to non-public commercial information if its disclosure would likely cause competitive harm.

In addition, Congress, aware of the longstanding, uniform judicial construction of Exemption 4, has enacted the same or virtually identical language 60 times in other statutes across the U.S. Code. Congress has thus ratified the exemption's longstanding competitive-harm requirement.

Given the announcements in the Solicitor General's brief and the case's "extraordinarily atypical" posture, U.S. Br. 32, this Court may want to consider whether this remains the proper case for examining Exemption 4. If this Court reaches the merits, however, the case for affirming the competitive-harm standard is overwhelming.

STATEMENT OF THE CASE

1. Published since 1881, the Argus Leader is South Dakota's most widely circulated newspaper. In 2011, an Argus Leader reporter submitted a FOIA request to the U.S. Department of Agriculture. Pet. App. 61a. The request sought the amount of federal funds paid to food retailers under the Supplemental Nutrition Assistance Program (SNAP), formerly the food-stamp program.

The reporter, who has published several articles on SNAP fraud,[1] sought the data as part of an investigation of a phenomenon called "retailer trafficking," whereby a retailer illegally exchanges SNAP benefits for cash (say, by accepting $100 in benefits, giving $50

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[1] *E.g.*, Jonathan Ellis, *States Accused of Submitting Bad Food Stamp Data*, Argus Leader, Nov. 28, 2016, http://tinyurl.com/y4c8quwy.

to the SNAP beneficiary, then claiming $100 from the Government and pocketing the rest). Trafficking has grown in recent years, with the Government Accountability Office citing USDA for failing to "prevent, detect, and respond to retailer trafficking."[2] USDA tracks and analyzes the same information that Argus requested "to investigate and sanction SNAP retailers who commit fraud." JA67.

2. Historically, retailers submitted physical food-stamp coupons and USDA would, absent a finding of irregularity, redeem them by disbursing federal funds. For that reason, the government-spending information[3] requested in this case is often called SNAP "redemption" data.

Today, food stamps have been replaced by a debit card-like system, where money is deposited into SNAP beneficiaries' accounts and they swipe their card (an "Electronic Benefit Transfer" or "EBT" card) at the checkout counter. Pet. App. 51a. The retailer's electronic-sale device communicates with a government contractor (an "EBT processor"), which confirms

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[2] GAO-19-167, SNAP: Actions Needed to Better Measure and Address Retailer Trafficking 17 (2018), http://tinyurl.com/y3wr3mbf.

[3] Petitioner incorrectly states "redemption data is not a record of Government payments" because payments are made to "the retailers' designated bank accounts, which may be associated with multiple stores," whereas the redemption data is broken down by individual-store location. Pet. Br. 5. If, for example, the Government sends $30 at once to Safeway based on three $10 transactions at three different stores, each $10 transaction record is no less a "record of Government payment" to Safeway. It is simply a more precise record.

the SNAP account is valid and has sufficient funds. JA64-67. Then, government funds are transferred through the EBT processor to the retailer. *Ibid.*

3. USDA refused to provide the requested federal-spending data, invoking, as relevant here, FOIA Exemptions 3 and 4.

Exemption 3 covers information "exempted from disclosure by statute." 5 U.S.C. §552(b)(3). Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." §552(b)(4).

Argus Leader sued to compel disclosure under FOIA, §552(a)(4)(B). In 2012, the district court granted USDA's motion for summary judgment under Exemption 3. Pet. App. 24a-45a. The court held the SNAP data was exempted by 7 U.S.C. §2018(c), a provision that bars disclosure of certain information "submit[ted]" to USDA as part of its "determination ... whether [a retailer] qualifies, or continues to qualify" for SNAP. Without finding that SNAP-funding disbursements play any role whatsoever in the retailer application or renewal process, the court held the data fell within §2018(c). Pet. App. 41a-42a.

The Eighth Circuit reversed. Pet. App. 48a-57a. Focusing on the statute's plain text, the court emphasized §2018(c) applies only to information retailers are "require[d] ... to submit" to USDA. Pet. App. 53a. The data sought by the Argus Leader does not qualify because USDA automatically obtains that data when SNAP transactions are electronically processed: "[USDA], not any retailer, generates the information,

and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." Pet. App. 54a. The Court of Appeals also held retailer-by-retailer SNAP-spending records are not, as required by §2018(c), part of USDA's "determin[ation] ... whether ... a ... retailer 'qualifies' or 'continues to qualify'" for SNAP. *Ibid.*

4. On remand, USDA sought to substantiate its reliance on Exemption 4. USDA requested input from "all current" SNAP retailers, calling and emailing them to inquire whether they thought release of SNAP-spending data would cause harm. Dkt. 59, at 2-4; *see* 79 Fed. Reg. 45,175 (Aug. 4, 2014). Of some 321,000 SNAP-participating retailers, just 323 (less than 1%) responded. Dkt. 59, at 4. Some responses opposed release; some had no objection or no comment; and some—apparently misconstruing the agency's question—responded by attempting to publicly disclose their store-level SNAP data by posting it to the agency website. JA85.

With the record showing over 99% of SNAP retailers "are not concerned about any competitive harm" from disclosure, Pet. App. 68a, USDA sought to fill the gap with testimony from several grocery-store executives. They asserted generally that retailer-level SNAP-spending data might be helpful to competitors. Pet. App. 11a-12a. They acknowledged, however, that a store's total SNAP funding provides, at most, a limited window into store operations. Pet. App. 11a-12a. Argus Leader's experts agreed, explaining that any "additional insights" from the SNAP data would be "very limited" because information most valuable to a

retailer's competitors—such as "prices, the promotional activity, the store layout, the level of customer service, and the product assortments"—is already publicly available. JA102, 107.

Evaluating the record evidence, the district court found USDA failed to meet its burden under the longstanding Exemption 4 standard, requiring it to demonstrate release would likely cause competitive harm. Pet. App. 16a. The court found "any potential competitive harm ... is speculative at best." Pet. App. 19a. While the court credited testimony that the industry relies on "model forecasts to determine where to add locations and that releasing SNAP data could improve the accuracy of these models," Pet. App. 13a, it found that any such improvement would be miniscule. The testimony of USDA's own expert showed SNAP data "would not add significant insights." Pet. App. 18a-19a.[4]

5. USDA decided not to appeal. The district court, however, allowed petitioner Food Marketing Institute (FMI) to intervene in the Government's stead. Pet. App. 71a-78a. Argus unsuccessfully opposed the intervention, arguing "FMI has misdirected its remedial efforts" and "should be separately targeting

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[4] As to potential "stigma," the court found USDA's claim was based on mere speculation that "high SNAP sales revenue might affect" business, including by leading a landlord not "to rent its commercial space to a retailer." Pet. App. 19a. Absent any supporting evidence, the court found this and similar consequences "unlikely." *Ibid.* A landlord, the court reasoned, would already "be []aware of its tenant's customer base." *Ibid.*

USDA and seeking some type of injunctive relief," rather than seeking to intervene in a FOIA suit against USDA. Dkt. 142, at 2.

FMI appealed. On appeal, USDA did not participate or in any fashion support reversal. The Eighth Circuit affirmed. The court found "no clear error" in the numerous findings supporting the district court's careful application of Exemption 4. Pet. App. 1a-6a.

SUMMARY OF ARGUMENT

I. Based on the positions of USDA, conveyed in the Solicitor General's brief to this Court, petitioner lacks Article III standing for want of redressability. Petitioner cannot show a favorable ruling on Exemption 4 would likely prevent USDA from releasing the requested records. Exemption 4 does not *forbid* the Government from releasing anything. It simply provides the Government with discretion.

The Solicitor General's brief reports USDA has decided it would disclose the requested government-spending records here, no matter how this Court rules on Exemption 4, so long as it has discretion to do so. Thus, a ruling by this Court on Exemption 4 would not prevent USDA from disclosing the information sought.

The one and only obstacle USDA sees to disclosure is its view that a separate statute—7 U.S.C. §2018(c)—withdraws its discretion to disclose. USDA, however, cannot refuse to disclose the records on that basis. The Court of Appeals' ruling in this case, to which USDA was a party, held that §2018(c) does not

apply here. No party sought this Court's review of that decision. USDA is thus bound.

In any case, USDA cannot lawfully exercise its discretion on the basis of an erroneous view of the law. The Eighth Circuit's straightforward reading of §2018(c)'s text is correct and should not be disturbed by this Court.

Because §2018(c) does not restrict USDA's discretion to release, and USDA has told this Court it would disclose the data if permitted, petitioner lacks standing. If, however, the Court addresses §2018(c) and disagrees with the Eighth Circuit's view, the Exemption 4 question this Court granted to resolve would become moot. Disclosure of the requested SNAP data would be barred in any event, so the question of Exemption 4's scope would be academic.

II. Statutory construction begins with the text. Exemption 4 of FOIA exempts "trade secrets" and "confidential" "commercial or financial information." For over 40 years, the courts of appeals have read that standard to require a showing of likely competitive harm. There is no basis to discard that uniform interpretation.

A. Congress did not define "confidential" commercial information. In examining undefined terms, this Court looks to dictionaries, the common law, and other sources of interpretive guidance to determine whether the term used by Congress has an established meaning.

Here, dictionaries are not dispositive, but the common law is. Dictionary definitions do not tell a court whether "confidential" information means information that is objectively confidential *in nature*, meaning sensitive and harmful if disclosed, or instead, as petitioner contends, unilaterally "treated as confidential" by the private-party source of the information.

By contrast, the common law supports the competitive-harm test employed by the courts of appeals. When FOIA was enacted, the common law protected against disclosure of confidential business information if the disclosure would cause competitive harm. In other words, "confidential commercial information" was a term of art at common law meaning business information that would cause competitive harm if disclosed. Consistent with this Court's well-settled interpretive practice, it should presume Congress adopted that term of art here. Exemption 4 is thus properly read to require likely competitive harm.

B. A second reason the longstanding competitive-harm standard must be retained is Congress has reenacted the text and ratified the standard *60 times*. Against the backdrop of the uniform judicial consensus that Exemption 4 requires an assessment of competitive harm, Congress has repeatedly incorporated Exemption 4 and its language into a multitude of other statutes. In so doing, Congress has unmistakably adopted the longstanding judicial construction.

C. Petitioner's interpretation, turning on whether the private party unilaterally treated the information as confidential, lacks merit. It is contrary to the term's

established common-law usage, Congress' 60 acts of ratification, and this Court's repeated admonition that FOIA exemptions should be narrowly construed.

In addition to dictionary definitions, common parlance and real-world examples show that the word "confidential" commonly refers, not just to information's secrecy, but also to the inherent nature of the information: whether it is sensitive and objectively harmful if disclosed. A range of analogous legal regimes—including state and federal judicial-sealing rules and civil-discovery practices—provide further support for this definition. They reveal a clear norm in the law: that non-public business information is shielded from disclosure only where harm would result. Exemption 4 is thus properly read to require a showing of harm from disclosure.

D. Petitioner's sweeping interpretation of "confidential" would undermine FOIA's core objective of, as this Court has put it, allowing the public to learn "what the Government is up to." It would make it far more difficult for the press and public to uncover evidence of government waste, fraud, and dereliction of duty. That is because the public must examine some data submitted to the Government (*e.g.*, contractor prices) to know what the Government is spending public money on. The public must also be able to examine what private parties submit to the Government (*e.g.*, compliance reports) to assess how and whether the Government is wielding its expansive regulatory powers.

E. The Solicitor General offers a different but equally flawed reading of "confidential": that information submitted to the Government automatically becomes "confidential" anytime the Government provides an "assurance" of confidentiality. The Government acknowledges no limits on its authority to offer such assurances. Such a far-reaching proposal is flatly contrary to FOIA's basic premise. Congress enacted FOIA to put an end to the days when the Government had unchecked discretion to refuse disclosure requests for any reason it deemed appropriate.

III. As to the second question presented, this Court should not dilute the longstanding competitive-harm standard that Congress has repeatedly ratified. Petitioner vastly overstates the administrative difficulties in applying the longstanding test: Almost all cases are resolved at the administrative level. Discovery is rare in FOIA cases; trials, even rarer, at just an average of three per year. Moreover, by looking to the common law in construing Exemption 4, courts will be able to draw upon well-established principles to decide any legal questions identified by petitioner that remain unsettled in the lower courts.

IV. Finally, under any applicable standard, the records requested here must be disclosed. Petitioner maintains that a record qualifies as "confidential" as long as it is treated as "confidential" by the party submitting the information to the Government. But here, it makes no sense to say that a private retailer submitted a record of a government-spending decision to the Government. That record was generated within the Government itself. That is why the district court

held the data was "obtained from" the Government's contractor responsible for processing SNAP transactions. Petitioner did not seek appellate review of that ruling. In any case, the requested record is plainly a record of a government-spending decision, meaning petitioner lacks any confidentiality interest protected by FOIA.

ARGUMENT

I. Petitioner Is Not A Proper Party To Enforce FOIA's Exemptions And Lacks Article III Standing.

Based on the positions of USDA, conveyed in the Solicitor General's brief to this Court, petitioner's Article III standing fails for want of redressability. Even if petitioner were to prevail in this Court on the meaning of Exemption 4, USDA would still retain discretion to disclose the data at issue. And USDA would exercise that discretion "to release store-level redemption data," *but for one and only one reason*: "its understanding of its legal obligations under Section 2018(c)" as barring disclosure. U.S. Br. 26, 35.

The Eighth Circuit, however, in its earlier ruling against USDA in this very case, rejected that "understanding" of §2018(c) as contrary to the statute's plain text. Pet. App. 54a. USDA was a party to, and is thus bound by, that ruling.

As detailed below, the Eighth Circuit's ruling regarding §2018(c) was also correct. USDA thus lacks any proper basis to refuse to exercise its announced discretionary decision to release the SNAP data. This

means petitioner's claimed "injury will [not] be redressed by a favorable decision" by this Court on the scope of Exemption 4. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotation marks omitted). If this Court, however, were to reach the §2018(c) question and disagree with the Eighth Circuit, that interpretation would then render the Exemption 4 issue moot.

For these reasons, this Court may wish to consider dismissing the case as improvidently granted. This Court has done so where, as here, "[i]n order to reach the merits of th[e] case," the Court "would have to address a question that was neither presented in the petition for certiorari nor fairly included in the ... question[s] that [were] presented." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993); *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). The unusual justiciability issues now presented are a consequence of the case's "extraordinarily atypical" posture, U.S. Br. 32, where a private party has improperly intervened in the Government's place in a FOIA suit—a statute that does not authorize any party other than the Government to oppose disclosure.

A. Petitioner's alleged injury is not redressable because, even if its construction of Exemption 4 prevails, USDA would exercise its discretion to disclose.

Petitioner lacks Article III standing because, even assuming its reading of Exemption 4 prevails, it is not "likely" that its claimed injury would be redressed by

a ruling from this Court on that issue. *Lujan*, 504 U.S. at 561.

As the Solicitor General's brief explains, no matter how this Court rules on Exemption 4, that ruling will not deprive USDA of discretion to release the SNAP data. U.S. Br. 32. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979), this Court held that "FOIA is exclusively a disclosure statute." The FOIA exemptions, such as Exemption 4, merely "demarcate[] the agency's *obligation* to disclose; [they do] not foreclose disclosure." *Ibid.* (emphasis added). Thus, a ruling by this Court on Exemption 4 in petitioner's favor would not compel USDA to withhold the requested data.

Sometimes private parties have standing to bring so-called reverse-FOIA suits objecting to disclosure. A reverse-FOIA suit is generally a case under the Administrative Procedure Act alleging an agency's decision to disclose is contrary to a statutory bar on disclosure *outside of* FOIA. *See Chrysler*, 441 U.S. at 317-19; *e.g.*, *Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

As relevant here, one such bar appears in the Trade Secrets Act, 18 U.S.C. §1905, a criminal statute prohibiting government officials from disclosing certain non-public commercial information. In other words, if disclosure would violate the Trade Secrets Act, an aggrieved party may bring an APA action maintaining it would be unlawful to release the information under the Trade Secrets Act. *Chrysler*, 441 U.S. at 318-19.

In this case, petitioner has never raised any claims under the Trade Secrets Act.[5] Nor has it brought a reverse-FOIA suit under the APA. Petitioner instead intervened in a FOIA action, over the objection of Argus Leader, which explained at the time that the proper procedure was to bring a separate action opposing disclosure. *Supra* pp. 7-8. As the Solicitor General explains, the intervention into this FOIA action was "extraordinarily atypical" and legally improper. U.S. Br. 32. Because a private-party intervenor such as petitioner lacks any right to oppose disclosure under FOIA, it cannot show the necessary "invasion of a legally protected interest" to support standing. *Lujan*, 504 U.S. at 560.[6]

Moreover, a private-party intervenor cannot establish redressability where, as here, the Government

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[5] While not at issue, the Trade Secrets Act would not bar disclosure here. Although courts have disagreed about the precise scope of the Act, none has construed it as broadly as petitioner construes Exemption 4. The D.C. Circuit has viewed the Trade Secrets Act as roughly coextensive with Exemption 4 as construed in *National Parks. Canadian Commercial Corp.*, 514 F.3d at 39. Other courts have read it more narrowly. *E.g.*, *United States v. Wallington*, 889 F.2d 573, 577 (5th Cir. 1989); *Gen. Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984). Whatever the Act's precise scope, it does not criminalize release of a document obtained from a party merely because that party treated the document as secret. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008 (1984) (reading the Act narrowly).

[6] The Second Circuit has dismissed for lack of standing in this precise posture, where a private party intervenes to appeal a FOIA case in the Government's stead. *Det. Watch Network v. Corr. Corp. of Am.*, No. 16-3141, 2017 WL 4122728, at *1 (2d. Cir. Feb. 8, 2017), *cert. denied* 138 S.Ct. 317 (2017).

retains discretion to disclose, even if a FOIA exemption applies. We now know from the Government's brief that USDA would exercise such discretion to disclose. U.S. Br. 26 ("USDA [has] inform[ed] [the Solicitor General] that it would now likely elect to release store-level redemption data nationwide" if it had the discretion to do so). Because USDA is likely to disclose the requested data in any event, a ruling on Exemption 4 by this Court is not likely to redress petitioner's alleged injury.[7]

B. The only basis on which USDA now resists disclosure—its interpretation of §2018(c)—was correctly rejected by the Court of Appeals.

The Solicitor General has informed this Court that USDA would now exercise its discretion to disclose the SNAP redemption data. The one and only obstacle USDA sees is its legal interpretation of

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[7] USDA's preference to exercise discretion to disclose makes sense. As the Government rightly emphasizes, retailers have no "objectively reasonable" "expectation of confidentiality" because the requested SNAP data "corresponds to" the "amount that the government pays a private entity to supply goods or services"—information "generally disclosed to the public." U.S. Br. 25-26.

Moreover, USDA's announced exercise of discretion is supported by an executive-branch directive—later codified prospectively by the 2016 FOIA Amendments, *see* 5 U.S.C. §552(a)(8)(A)(i)—prohibiting agencies from relying solely on exemptions to avoid disclosure. Under this directive, an "agency should not withhold information simply because" a FOIA exemption applies. Att'y Gen., Memorandum for Heads of Executive Departments and Agencies (March 19, 2009). Agencies are "strongly encourage[d] ... to make discretionary disclosures." *Ibid.*

§2018(c), which it views as barring disclosure of the data.

USDA, however, *lost* on that issue in the Eighth Circuit in this very case. And neither petitioner nor the Government sought this Court's review of that §2018(c) holding, even though either could have done so (USDA, following the Eighth Circuit's 2014 ruling, and petitioner, following the Eighth Circuit's more recent decision). USDA is not free to exercise its discretion in this very case by disregarding a ruling to which it was a party. There would be no question that, if this Court were to affirm, or had denied certiorari, USDA would not be able to invoke §2018(c) as a basis for nondisclosure after having lost on the issue. Likewise, if this Court were to rule in petitioner's favor on Exemption 4, USDA could not then refuse to disclose based on §2018(c).

In any event, the Eighth Circuit's 2014 ruling was clearly right. Because USDA must act "in accordance with law," 5 U.S.C. §706(2)(A), it cannot ground its refusal to release the requested information in a legally erroneous view of §2018(c). If an agency action rests upon "an exercise of judgment in an area which Congress has entrusted to the agency," the action "m[ay] not stand" if it "is based upon a determination of law" and "the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

The Eighth Circuit, emphasizing the statute's plain text, held SNAP redemption data did not fall within §2018(c). Pet. App. 56a. Reinforcing that interpretation, §2018(c) imposes "criminal punishment," Pet. App. 39a, an important point because courts

must exercise "restraint in assessing the reach of a federal criminal statute," *Marinello v. United States*, 138 S.Ct. 1101, 1106 (2018).

Section 2018(c) bars disclosure of a limited set of information: information USDA "require[s] an applicant retail food store ... to submit" for the specific purpose of making a "determination ... as to whether such applicant qualifies, or continues to qualify" for the program. Carefully construing that text, the Eighth Circuit correctly held §2018(c) inapplicable for three reasons.

First, redemption data is not information retailers are "require[d]" to "submit" to USDA. USDA automatically obtains that information when SNAP transactions are electronically processed. As the Court of Appeals explained, USDA itself, "not any retailer, generates the information, and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." Pet. App. 54a.

That is fully supported by the record. SNAP redemption data—the information requested by Argus here—provides a record of a *consummated* transaction. While the retailer certainly transmits some data electronically when a SNAP beneficiary swipes his or her card at the register, that data includes only the requested transaction amount. JA49, 76. It does not, and could not, include confirmation the account is valid and has sufficient funds. The EBT vendor (the government contractor that electronically processes SNAP transactions) makes and records that determination separately. *Supra* pp. 4-5; U.S. Br. 3-4. Accordingly, the EBT processor's role is far more involved

than the Postal Service's ministerial role in "transmit[ing] [mail]." U.S. Br. 31. And regardless, a private party simply cannot be said to "submit" a record of the Government's own conduct (*i.e.*, approving and executing disbursement of federal funds).

Second, the Eighth Circuit properly concluded SNAP redemption data is not information "require[d]" to be provided to determine whether a retailer "qualifies, or continues to qualify" for the program. "Neither of the forms used to determine whether a given retailer 'qualifies' or 'continues to qualify' as a program participant asks for the spending information." Pet. App. 53a-54a. The Solicitor General does not claim otherwise.

Context about administration of the SNAP program confirms redemption data is immaterial to application and renewal decisions. When §2018(c) was enacted, retailers submitted food-stamp coupons, along with a "redemption certificate" (essentially a deposit slip) indicating "the value of the coupons redeemed," for the simple reason that such a submission was necessary to be paid. 7 C.F.R. §278.4(c) (1979) (retailers "shall use the redemption certificates for th[e] purpose" of exchanging "coupons ... for cash"). Redemption-related information was, however, never provided as part of USDA's retailer application and renewal process.

Today, that characterization would make even less sense. The Government *already has* redemption information, which it automatically obtains when it electronically processes SNAP transactions. It is

simply wrong to suggest that redemption data is provided as part of retailers' applications for participation in SNAP.

Third, the Eighth Circuit correctly held a separate statute, 7 U.S.C. §2019, regulates retailers' redemption of SNAP funding. Pet. App. 56a. That statute provides for "[r]egulations" governing the "redemption of benefits accepted by retail food stores." Thus, unlike §2018(c), §2019 has long expressly addressed redemption data. That would therefore be the logical place for Congress to make any directive to withhold SNAP redemption data. But no such directive appears there, forcing USDA to turn to §2018(c), stretching its text to invent a bar on redemption-data disclosure. That this internal-government view of §2018(c) may be "longstanding" (U.S. Br. 31) does not make it right. Nor do scattered statements in the Federal Register or legislative reports (cited at U.S. Br. 29-30) overcome the textual problems with USDA's interpretation.

For all these reasons, there is no basis to disturb the Eighth Circuit's ruling on §2018(c). Even USDA indicates that it "might have explored changing its position" that §2018(c) bars release of SNAP redemption data, were it not for a curious recent amendment of the statute, enacted in the final days of the 2018 legislative session. U.S. Br. 26 n.5. While the amendment addresses SNAP redemption data, it does not alter the Eighth Circuit's construction of the provision. It thus provides no valid basis for USDA to refuse to disclose the requested SNAP data.

The 2018 amendment made the following insertion to §2018(c):

> [USDA] ... shall require an applicant retail food store ... to submit information, which may include **... redemption data provided through the electronic benefit transfer system** .... Any person who ... discloses ... information obtained under this subsection shall be fined ... or imprisoned ....

Agriculture Improvement Act, Pub. L. No. 115-334 (2018). Whatever the import of the amendment, it cannot be read to restrict USDA's discretion to release redemption data. While Congress was demonstrably aware of the Eighth Circuit's ruling, Congress opted not to address the legal basis for it. As discussed, the Eighth Circuit held that redemption data is not "submit[ted]" to USDA within the meaning of §2018(c). The 2018 amendment does nothing to alter this threshold requirement under §2018(c). For information to come within the provision, it still must be "submit[ted]" to USDA.

It was not as if Congress was unaware of the Eighth Circuit's analysis. A prior version of the bill—ostensibly designed to moot this case—expressly exempted disclosure of the retailer-specific SNAP data under FOIA.[8] But it was not enacted.

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[8] H.R. 5961, 115th Cong. §768 (2018) ("Any [SNAP] transaction data that contains information specific to a retail food

Moreover, if Congress had intended the statute to forbid disclosure of government records, it would have made express reference to FOIA. Since 2009, FOIA has required a statute to "specifically cite[] to" Exemption 3 to qualify as a non-FOIA statute that "specifically exempt[s]" records from disclosure under that provision. 5 U.S.C. §552(b)(3)(B). That is why the text of the unenacted provision, *see supra* n.8, includes the express reference to "section 552(b)(3) of title 5." By contrast, the amendment Congress ultimately enacted includes no such reference.

In sum, even if USDA were not bound by the Eighth Circuit's prior ruling against it on this very issue in this very case, it could not now properly construe §2018(c) to restrict its authority to disclose the SNAP data requested here. USDA is thus free to release the data, as the Solicitor General has told this Court it prefers to do.

Accordingly, petitioner lacks standing because even if this Court accepts petitioner's interpretation of Exemption 4, that ruling would not likely redress petitioner's claimed harm.[9]

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store ... shall be exempt from ... section 552(a) of title 5 of the United States Code pursuant to section 552(b)(3).").

[9] If this Court were to address §2018(c) and conclude it bars disclosure of the requested SNAP data, that ruling would render moot the Exemption 4 question. Disclosure would be barred in any event, so interpretation of Exemption 4 would be purely academic.

II. Exemption 4 Of FOIA Requires An Assessment Of Likely Competitive Harm.

As always, this Court's interpretation of a statute "begins with the text." *Ross v. Blake*, 136 S.Ct. 1850, 1856 (2016). FOIA Exemption 4 allows an agency to withhold information to the extent it contains: "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).

Congress did not define "confidential" commercial information. And dictionary definitions provide no conclusive answer: They do not tell a court whether to read the provision as referencing information that is confidential *in nature*, such that its release would be objectively harmful, or instead to view information as "confidential" merely because it is treated as secret by its private-party source (as petitioner argues).

Where the key terms of a statute are undefined, this Court often looks to the common law to determine whether the undefined term has an established meaning, *i.e.*, whether it has been used as a legal term of art. Here, the common law provides a clear answer: Commercial information is deemed confidential if disclosure would likely cause competitive harm.

For over 40 years, an objective competitive-harm standard has governed in the lower courts.[10] Petitioner asks the Court to now cast aside that

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[10] *See, e.g., Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (likely to cause "harm to the competitive position of the person from whom the information was obtained"); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d

longstanding approach, but such upheaval is wholly unwarranted. Congress, well aware of the uniformly adopted judicial construction, has repeatedly ratified the longstanding competitive-harm standard by incorporating Exemption 4 and its text into *60* other provisions across the U.S. Code.

Moreover, that reading of Exemption 4 respects this Court's repeated instruction that the FOIA exemptions must be "narrowly construed." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (quotation marks omitted). That well-established interpretive principle reflects FOIA's fundamental contribution to our constitutional order: The Act's basic objective "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This Court has explained that the "limited exemptions do not obscure the basic

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373, 375 (2d Cir. 1977); *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Gen. Elec. Co.*, 750 F.2d at 1402-03 (disclosure must "inflict ... competitive harm"); *Acumenics Research & Tech. v. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Pac. Architects & Eng'rs Inc. v. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 947 (10th Cir. 1990) ("competitive injury would likely result" (quotation marks omitted)); *OSHA Data / CIH, Inc. v. Dep't of Labor*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000); *Contract Freighters, Inc. v. Dep't of Transp.*, 260 F.3d 858, 862 (8th Cir. 2001).

policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

A. Exemption 4's plain language, informed by the common law, requires reading "confidential" commercial information to turn on a showing of competitive harm.

Exemption 4 is limited to: "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). As noted above, FOIA "does not define the word 'confidential.'" *Dep't of Justice v. Landano*, 508 U.S. 165, 173 (1993). Absent an express definition, this Court typically looks to dictionaries, common parlance, and common-law usages to define a statute's terms.

Petitioner contends that dictionary definitions of "confidential" require reading Exemption 4 to turn on whether a private party treated the information it submitted to the Government as secret. Pet. Br. 17-19. But dictionaries show that is not the only way that "confidential" is used. It is also used to mean confidential *in nature*—in other words, not ordinarily disclosed because the information is inherently sensitive and would be harmful if released. Or as this Court has

put it, information is "confidential" if its nature creates an objectively "reasonable expectation of confidentiality." *Landano*, 508 U.S. at 173.[11]

Petitioner's own examples illustrate this common understanding of "confidential." For instance, petitioner cites (Pet. Br. 20 n.11) a decision stating that a "report was a confidential document." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 534 (1961). But the full quoted paragraph explains the report contained several controversial "unsolicited recommendations" (about how a government agency should direct its resources) and referenced a "vast quantity" of sensitive internal-government data. *Ibid.* So "confidential report" could mean "report kept secret," but in context, it is better read to mean "inherently sensitive report."[12]

Beyond dictionaries, in reading a statute's plain text, this Court frequently looks to the common law to determine if Congress used a term of art with a well-developed legal meaning. *See, e.g., Neder v. United States*, 527 U.S. 1, 22 (1999) (term "fraud" is one with

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[11] "Of the nature of confidence," WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1934); "of the nature of confidence," "*[b]etokening* private intimacy," THE OXFORD UNIVERSAL DICTIONARY ILLUSTRATED (3d ed., 1959) (emphasis added); "*indicating* close intimacy," WEBSTER'S NEW COLLEGIATE DICTIONARY (1951) (emphasis added); "*of or showing* confidence," WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, Concise Edition (1960) (emphasis added).

[12] We explain this common usage of "confidential" to mean "confidential *in nature*" in more detail below (pp. 42-51), referencing a variety of sources, including this Court's analysis in *Landano* and numerous real-world examples.

"a well-settled meaning at common law"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (same for "employee"). As this Court has explained, "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (quotation marks omitted).

Indeed, when a term used by Congress had an established term-of-art meaning at common law, that often begins and ends the textual inquiry. Dictionaries and other guides to plain meaning are frequently unnecessary or inconclusive where it is evident Congress adopted a term from the common law. *E.g.*, *Neder*, 527 U.S. at 22; *Reid*, 490 U.S. at 739; *see also Hall v. Hall*, 138 S.Ct. 1118, 1124 (2018) (where term had an established "legal lineage," "looking to dictionari[es]" was not determinative).

Here, while dictionaries do not provide any dispositive reading of Exemption 4, the common law does. As we detail below, "confidential" is properly read in accordance with its term-of-art usage: "Confidential commercial information" has traditionally referred to non-public business information that would cause competitive harm if disclosed.

1. When FOIA was enacted, "trade secrets and other confidential commercial information" was an established term of art for business information that would likely cause competitive harm if disclosed.

When Exemption 4 was enacted, there was an established common-law term of art for non-public business information, disclosure of which would be tortious because it would cause competitive harm. Both courts and the relevant (and near-universally adopted) provisions in the first RESTATEMENT OF TORTS (1939) used the term "trade secrets and other confidential commercial information" (or some near-identical equivalent) to refer to this body of protected materials. Thus, in saying "trade secrets and other confidential commercial information," courts and commentators meant non-public business information that would likely cause competitive harm if released.

Exemption 4 likewise juxtaposes "trade secrets" and "confidential commercial information." This was no accident. The first RESTATEMENT OF TORTS, where Congress would have looked for the definition of trade secrets when enacting FOIA, employed a similar distinction between trade secrets and other confidential commercial information entitled to essentially the same protection. It defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competi-

tors who do not know or use it." §757, cmt. b. The RESTATEMENT separately referred to other "secret information in a business" that did not qualify as a formal "trade secret": in particular, "information as to single or ephemeral events in the conduct of the business." *Ibid.*[13]

Critically, this second subset of information was subject to "rules virtually identical to those applicable to trade secrets"—*i.e.*, it was shielded from disclosure if the information would afford an "economic advantage over others." RESTATEMENT (THIRD), UNFAIR COMPETITION §39 & cmt. d (1995) (summarizing principles in first RESTATEMENT OF TORTS); *see also Protection and Use of Trade Secrets*, 64 Harv. L. Rev. 976, 976 n.5 (1951) (same).

The reason for the similarity was that both trade secrets and other non-public business information were shielded under common-law unfair competition principles—the essential element of which is likely competitive harm. As the first RESTATEMENT OF TORTS put it, the common law barred "procur[ement] by improper means [of] information about another's business" to "advanc[e] a rival business interest." §759. Disclosure of both trade secrets and non-public

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[13] The RESTATEMENT provided as examples of such "ephemeral" information: "terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or ... new model." §757, cmt. b.

business "information not a trade secret" would violate this bar on wrongful disclosure. §757 cmt. b.[14]

Courts have long embraced this same usage. They have often addressed both "trade secrets" and "confidential business information" in the same breath to refer to all non-public commercial information that would likely cause competitive harm, and thus be tortious, if disclosed.[15] Given that, in 1966, trade secrets and confidential business information were commonly referenced together and widely protected at common law from disclosure for the same reason—the likelihood of competitive harm—it is unsurprising that

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[14] The first RESTATEMENT OF TORTS addressed tortious disclosure of confidential commercial information and other unfair-competition principles. The subject was then dropped from any Restatement until the first edition of the RESTATEMENT OF UNFAIR COMPETITION (called RESTATEMENT (*THIRD*), UNFAIR COMPETITION).

[15] *E.g.*, *Metropolis Bending Co. v. Brandwen*, 8 F.R.D. 296, 298 (M.D. Pa. 1948) ("[t]rade secrets and other business information"); *Smith v. Dravo Corp.*, 203 F.2d 369, 374-75 (7th Cir. 1953) ("[c]onfidential business information" and "trade secret"); *Seismograph Serv. Corp. v. Offshore Raydist, Inc.*, 135 F. Supp. 342, 354 (E.D. La. 1955) ("business information or trade secrets"); *McDonald's Corp. v. Moore*, 243 F. Supp. 255, 258 (S.D. Ala. 1965) ("business information or trade secrets"); *Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel's Distillery*, 207 F. Supp. 136, 138 (N.D. Cal. 1961) ("confidential information [and] trade secrets"); *Lyon v. Gen. Motors Corp.*, 200 F. Supp. 89, 91 (N.D. Ill. 1961) ("confidential information and trade secrets"); *Food Processes, Inc. v. Swift & Co.*, 280 F. Supp. 353, 362 (W.D. Mo. 1966) ("confidential information and trade secrets"); *Sybron Corp. v. Wetzel*, 385 N.E.2d 1055, 1056 (N.Y. 1978) ("trade secrets or confidential information"); *USM Corp. v. Marson Fastener Corp.*, 393 N.E.2d 895, 902-03 (Mass. 1979) ("trade secrets" and "confidential ... business information" (quotation marks omitted)).

Congress incorporated both categories, paired together, in FOIA Exemption 4.

This Court presumes Congress looks to term-of-art usages in both case law and the relevant Restatement. *E.g.*, *Field v. Mans*, 516 U.S. 59, 70 (1995) (Restatement is "the most widely accepted distillation of the common law"). That presumption is especially appropriate here because few, if any, Restatement provisions have been as widely adopted as the first RESTATEMENT OF TORTS definition of trade secrets. *See Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 266 (1979) (the "most commonly accepted definition"); 1 TRADE SECRETS LAW §3:2 (2018) ("so universal that it is difficult to find a modern trade secret case that does not ... heavily rely upon [it]").[16]

Moreover, this interpretive principle fully applies under FOIA, which courts often construe by looking to the common law. *See, e.g., Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167-68 (2004) (construing "personal privacy" in Exemption 6 to protect "tradition" with "deep[] roots in the common law"); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d

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[16] While not at issue here, the D.C. Circuit in *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286-88 (1983), recognized the first RESTATEMENT OF TORTS definition was widely accepted, but nonetheless adopted a narrower definition under Exemption 4. As petitioner acknowledges, the D.C. Circuit incorrectly departed from the "broad common-law definition of trade secrets ... widely accepted in other areas of the law." Pet. 20.

350, 356 (2d Cir. 2005) (construing Exemption 5 to adopt common-law principles).[17]

Years after FOIA was enacted, the trade-secrets definition was broadened. Most notably, the drafters of both the Restatement and the Uniform Trade Secrets Act eliminated the distinction between trade secrets and other protected business information, such that "trade secret" now covers all non-public business information that would cause competitive harm if disclosed. *See* RESTATEMENT (THIRD), UNFAIR COMPETITION §39 cmt. d; Uniform Trade Secrets Act, §1, cmt., 14 U.L.A. 543 (1985). This formalized the prior state of affairs where the two categories were given "virtually identical" protection at common law. But the 1966 Congress enacting FOIA would have looked to the then well-established usage, juxtaposing "trade secrets" with other "confidential commercial information," both requiring a showing of competitive injury to give rise to tort liability for improper disclosure.

Finally, this term-of-art construction is faithful to Congress' expectation that courts "provide 'workable' rules" when construing FOIA's exemptions. *FTC v. Grolier Inc.*, 462 U.S. 19, 27 (1983). Construing Exemption 4 to embrace the common-law understanding

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[17] In both *Favish* and *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989), this Court looked to common-law privacy torts to construe FOIA's references to "privacy." The Court also noted that Exemption 7 "goes beyond the common law." 541 U.S. at 170. All the Court appeared to mean was that the statutory term "privacy" was not, as is the case here, a "term of art that has a widely accepted common-law meaning." *Molzof v. United States*, 502 U.S. 301, 306 (1992).

of confidential business information supplies administrable answers to the questions that, in petitioner's view, have generated difficulties in applying the competitive-harm standard. Pet. Br. 40-41. For example, as discussed below (pp. 61-63), the common law shows why competitive harm must be "likely," not merely "possible." Pet. Br. 48-49. In this way, common-law incorporation has a "stabilizing" effect, directing courts today to the understandings reached by their predecessors when grappling with similar questions in the past. *See* Antonin Scalia & Bryan A. Garner, READING LAW 318, 320 (2012) (calling this a "stabilizing canon").

2. Common-law rules regarding special evidentiary privileges and fiduciary relationships have no application here.

Petitioner points briefly to two other areas of common law: attorney-client confidentiality, Pet. Br. 22, and the marital-communications privilege, *id.* at 20 n.11. But those doctrines are not analogous to confidentiality issues that arise under FOIA, and thus have no application here. Such privileges are limited to "special relationships" where there is a strong expectation of secrecy. *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997); *see Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (similar). No similar "special relationship" exists when a private party furnishes information to a government agency.

Nor is the common-law fiduciary relationship—shielding forms of business information through fiduciary obligations—a guide for construing FOIA. The

common law has long imposed a fiduciary duty on employees and other agents not to reveal private information they learn in the course of their duties. RESTATEMENT (THIRD), AGENCY §8.05(2) (2006). As this Court has explained in a case involving a fiduciary breach, "a person who acquires special knowledge ...by virtue of a ... fiduciary relationship with another is not free to exploit that ... information for his own personal benefit but must account to his principal for any profits derived therefrom." *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987) (quotation marks omitted).

Congress would not have looked to this fiduciary rule when enacting Exemption 4. An agent's duty of nondisclosure is an essential part of the agent's broader duty, rich in legal tradition, "to act loyally for the principal's benefit." RESTATEMENT (THIRD), AGENCY §8.01. There is no basis to engraft that duty onto the Government when making disclosure decisions under FOIA. The Government owes no fiduciary duty to private parties that submit information.

By contrast, all parties, *including the Government*, are barred from wrongfully disclosing trade secrets and closely related non-public business information that would cause competitive harm. As discussed, private parties are subject to longstanding tort rules forbidding wrongful disclosure of such information. And as for the Government, it is a Fifth Amendment "taking" to reveal such information after the Government collects it. *Monsanto*, 467 U.S. at 1010-11. Naturally, then, Congress would have looked to the common law's protection of trade secrets

and similar non-public commercial information when enacting FOIA.

In sum, the common law accorded protections virtually identical to trade secrets to non-public business information. As with trade secrets, disclosure of this information was tortious if competitive harm would likely result. Exemption 4 is properly construed to incorporate that common-law understanding.

B. Congress has ratified the longstanding judicial consensus that Exemption 4 requires likely competitive harm.

A second reason that Exemption 4 is properly read to require a competitive-harm showing is Congress has ratified the longstanding judicial consensus. Since the D.C. Circuit decided *National Parks* in 1974, all other circuits to address Exemption 4 have agreed information qualifies as "confidential" if disclosure would "impair the Government's ability to obtain necessary information in the future" or harm "the competitive position of the person from whom the information was obtained." 498 F.2d at 770. *Supra* pp. 24-25 n.10.

With that judicial consensus as a backdrop, Congress has enacted 46 statutes with 60 separate provisions that either expressly incorporate Exemption 4 into specific agency disclosure regimes or enact a virtually identical standard. For instance, in 1991, Congress prohibited the Secretary of Transportation from exercising any discretion to disclose certain infor-

mation related to development of high-speed rail projects. Congress turned to the text of Exemption 4 to specify the scope of what should be shielded: "commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of title 5." 49 U.S.C. §309 note.

To the same effect, Congress has in other instances incorporated Exemption 4's language by express cross-reference. In a 1988 statute, for example, Congress aimed to protect sensitive portions of reports to the Attorney General on authorized controlled-substance distributors. Again, Congress turned to Exemption 4: "[A]ny information ... which is exempt from disclosure under ... section 552(b)(4) ... may not be disclosed to any person." 21 U.S.C. §830(c)(1).

The list goes on. In all but one Congress from the 93rd to the 115th (which ended last year), Congress has enacted at least one statute incorporating the Exemption 4 standard. All 60 provisions, their text, and dates of enactment are included in the appendix attached to this brief.

This significant degree of congressional reenactment and extension of a provision and its text, in the face of a uniform judicial construction, shows that Congress has ratified the prevailing standard. It is well-settled that when Congress reenacts the same language or "substantially the same" language that has been given a uniform judicial interpretation, *Shapiro v. United States*, 335 U.S. 1, 6 (1948), "it adopt[s] the ... judicial construction," *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S.Ct.

628, 633-34 (2019). This is true whether that judicial construction comes from this Court or, as in *Helsinn* and other cases, "lower-court opinions" that are, as here, "uniform" and "sufficiently numerous." Scalia & Garner, *supra* at 325; *e.g.*, *Davis v. United States*, 495 U.S. 472, 482 (1990); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Ordinarily, the ratification canon comes into play where Congress reenacts language in the same statute. While that is not the case here—*i.e.*, Congress has not reenacted Exemption 4 itself as part of FOIA—the case for ratification is even stronger. Under the classic formulation in this Court's cases, all it takes for Congress to ratify is to reenact the same language *just once*. Here, Congress has reenacted Exemption 4's standard *60 times*, applying it in an extraordinarily wide range of statutory settings.[18] As this Court has recognized, the more times Congress enacts the same judicially construed language, the more certainty this Court can have in concluding Congress has ratified the judicial interpretation. *See Shapiro*, 335 U.S. at 6-7 & n.4 (listing 26 statutes where Congress enacted an earlier provision "in substantially the same terms").

One subset of the statutes makes ratification particularly clear here. In ten of them (denoted by "†" in the Appendix), Congress has extended Exemption 4's

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[18] This case thus differs markedly from one where a party argues Congress has accepted lower-court interpretations based on mere legislative "'inaction'" or "acquiescence." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994).

standard to exempt from mandatory disclosure records that were not furnished by a private party and, thus, would not otherwise fall within Exemption 4. *See* 5 U.S.C. §552(b)(4) (records must be "obtained from a [non-Government] person"). For example, a 2007 statute authorized the Secretary of Energy to exempt from FOIA renewable energy-related information that "would be" "confidential ... commercial or financial information under subsection (b)(4) of [FOIA] *if the information had been obtained from a non-Government party*." 42 U.S.C. §17244(h) (emphasis added).

The clear import is that government-generated records are exempt if their disclosure would, under the uniform, judicially adopted standard, pose the same likelihood of competitive harm as if obtained from a private party. By contrast, petitioner's interpretation of "confidential"—"kept secret" by the submitting party—would make no sense in this context. Government-generated records are simply not "kept secret" by any private party.

Two additional factors further support ratification here. *First*, FOIA is, like the tax code, an "area ... of traditional year-by-year supervision." *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) (same). Indeed, Congress has committed to "regularly review" the statute "to determine whether further changes ... are necessary to ensure that the Government remains open and accessible." Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. And that is exactly what Congress has done: FOIA requires the Attorney General to submit for congressional review

annual reports summarizing the disposition of all FOIA litigation, and each agency to submit annual reports cataloging every decision to withhold information. 5 U.S.C. §552(e)(1)(A), (6)(A). Congress also routinely holds hearings on FOIA, including Exemption 4 specifically.[19]

Second, FOIA itself has been amended some dozen times since its enactment. Such "full and continuing congressional awareness" strengthens the inference of congressional ratification because each revision provides a natural opportunity to review judicial constructions. *Flood v. Kuhn*, 407 U.S. 258, 281-83 (1972); *see also, e.g., Manhattan Props., Inc. v. Irving Tr. Co.*, 291 U.S. 320, 336 (1934). Several FOIA amendments have specifically responded to judicial interpretations of the exemptions. *E.g.*, Pub. L. 93-502, 88 Stat. 1561 (1974) (responding to *EPA v. Mink*, 410 U.S. 73 (1973)); Pub. L. 99-570, §1802(a), 100 Stat. 3207 (1986) (responding to Exemption 7 case law).

Contrary to petitioner's view, the D.C. Circuit's ruling in *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), did not alter the judicial consensus that Congress has re-

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[19] *E.g.*, Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations, 95th Cong. 2 (1977); Freedom of Information Reform Act: Hearing on S. 774, Hearings Before the Subcomm. of the H. Comm. on Gov't Operations, 98th Cong. 279-401 (1984).

peatedly ratified. Just the opposite: *Critical Mass re-affirmed* the "circuit precedent of almost twenty years' standing." *Id.* at 875.

Petitioner incorrectly contends *Critical Mass* "rejected the *National Parks* definition in the context of information voluntarily submitted to the Government." Pet. Br. 30 (emphasis omitted). *Critical Mass* was a straightforward application of *National Parks* to "voluntarily submitted" information. With respect to the first *National Parks* prong—impairing the Government's ability to obtain necessary information—*Critical Mass* explained that, when "information is volunteered, the Government's interest is in ensuring its continued availability." 975 F.2d at 878. Thus, "categorical treatment" under *National Parks* was in order: When "the Government has secured [information] from voluntary sources on a confidential basis," releasing that information would "jeopardize its continuing ability to secure such data on a cooperative basis." *Id.* at 879. That "categorical" rule made consideration of the second prong—competitive harm—unnecessary.

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In short, Congress has reenacted and extended the Exemption 4 standard 60 times in the face of the provision's uniform judicial interpretation. A clearer case of ratification could scarcely be imagined.

C. Exemption 4's reference to confidential commercial information is properly read to mean information objectively "confidential in nature."

Petitioner argues that "confidential" commercial information, as used in Exemption 4, must be read to mean information "kept secret" by the person furnishing the information. Pet. Br. 2. That view, however, cannot overcome either of the two grounds, discussed above, requiring a showing of competitive harm: the established usage of "confidential commercial information" as a term of art at common law, and Congress' repeated ratification of the longstanding judicial consensus. Nor can petitioner's view be squared with this Court's repeated admonition that FOIA's exemptions are to be construed narrowly.

Exemption 4's text—read, not just in light of dictionaries (*supra* p. 27 n.11), but also this Court's precedent, common parlance, numerous real-world examples, and analogous sources of law—shows that "confidential" commercial information is properly interpreted as information that is "confidential in nature," *i.e.*, inherently sensitive and likely harmful if disclosed.

1. A variety of sources, including this Court's precedent, discredit petitioner's view that "confidential" must mean "kept secret," rather than "confidential in nature," "sensitive," and "likely harmful."

Petitioner's sweeping reading of Exemption 4 ignores the basic difference between information that is objectively confidential *in nature*, and information that is merely treated as a secret, without reference to its underlying nature. That distinction, reflected in the common law, is also reflected in this Court's reading of the word "confidential" in other settings, common parlance, and real-world examples, including judicial opinions, statutes, and court rules.

Landano. Exemption 7(D) of FOIA permits a federal agency to withhold "law enforcement" records that "disclose the identity of a confidential source." *Landano* rejected the equivalent of petitioner's proposed interpretation of Exemption 4. This Court refused to read "confidential source" to turn on the unilateral expectations of the source that the provided information would remain secret. Rather, this Court insisted on a showing that the information was confidential *in nature*, requiring "a reasonable expectation" or "inference" of confidentiality. 508 U.S. at 173, 179.

In applying that standard, the Court asked whether, objectively, there was a risk of harm from disclosure. For example, the Court pointed to "the

character of the crime at issue"—especially "gang-related" offenses—as a sign that the informant might fear identification and be "worried about retaliation" by the perpetrators. *Id.* at 179.

The Government agrees with this understanding of *Landano* and that, applied here, it requires "an objective assessment" whether there is a "reasonable expectation of confidentiality." U.S. Br. 17 (quotation marks omitted). Further, the Government agrees this assessment looks to the nature of the information at issue. For instance, here, there is no objectively reasonable expectation of confidentiality because the SNAP data is "intimately linked to the government's own actions, actions that one would not reasonably expect to be kept confidential." U.S. Br. 25; *see infra* pp. 59-61 (discussing Solicitor General's proposed interpretation of Exemption 4).

Petitioner nevertheless insists *Landano* supports its interpretation because the Court stated a "source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication." 508 U.S. at 174. But the question is *how* courts should go about determining the source's intent: by looking to the source's *unilateral* desire to keep information secret, as petitioner seeks here, or instead by examining the nature of the communication to determine whether it is the kind of information reasonably considered con-

fidential in nature. *Landano* selected the latter approach under Exemption 7(D). There is no reason a different approach should apply under Exemption 4.[20]

Common Parlance. Another important way we know "confidential" is often used to mean "confidential in nature" is by looking to how an "individual might" use the word. *FCC v. AT&T Inc.*, 562 U.S. 397, 403-04 (2011). As Justice Scalia said, the "acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." *Johnson v. United States*, 529 U.S. 694, 718-19 (2000) (dissenting).

In that regard, imagine you are at a social gathering and your host says to you, "I have a question about your colleague Tom. Has he ever told you any confidential information?" Imagine further that Tom had, just that morning, told you his ATM-card pin number. (He wanted you to take his card and withdraw some cash for him.) Without knowing anything about how careful Tom is about concealing his financial information, you would answer, "Yes, Tom has told me confidential information." That's because a

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[20] *Landano* also suggested, without deciding, that a source might be treated as "confidential" if the FBI "made explicit promises of confidentiality." 508 U.S. at 172. This observation, of course, reinforces that a source lacks the *unilateral authority* petitioner seeks to decide which information should be shielded from disclosure. In any event, the Court could not have meant the Government has the power to decree that every source is confidential merely by making such a pledge. That would eviscerate the Court's holding that the Government may *not* "presume that virtually every source is confidential." *Id.* at 174-75.

pin number is objectively *confidential in nature*. It is *sensitive* information. By contrast, if Tom had never said a word to you beyond harmless pleasantries—like weekend plans or his thoughts on the baseball game last night—your answer would be "no." There would be no objective reason to expect that information to be treated as confidential.

Real-World Usages: Judicial Opinions. It is entirely natural to say that certain information is "confidential information" because it is "confidential in nature," that is, "highly personal," "sensitive," and "intimate." *New Jersey Bell Tel. Co. v. NLRB*, 720 F.2d 789, 790-91 (3d Cir. 1983) (discussing sensitive employment files such as employee tardiness records). For example, in *Nat'l Treasury Employees Union v. Von Raab*, Justice Scalia equated "sensitive information" with "confidential information." 489 U.S. 656, 685-86 (1989) (dissenting). Similarly, in *King v. Bryant*, 795 S.E.2d 340, 350 (N.C. 2017), the court described information as "confidential" because it was "*inherently sensitive* and confidential in nature." *Ibid.* (emphasis added) (discussing certain "medical information"). Such designations are based on the nature of the information, not a party's say so. *See, e.g., Corning Glass Works v. U.S. Int'l Trade Comm'n*, 799 F.2d 1559, 1564 n.3 (Fed. Cir. 1986) ("materials marked confidential" by the submitting party, were improperly designated as "confidential" because the information was "non-confidential in nature").

Similar examples abound. To take just a few, it is common to find courts and other speakers remarking

that information is "highly confidential" or "more confidential" than other information. That usage often reflects a view about the information's intrinsic sensitivity, rather than its mere secrecy. For example, a party might argue that disclosure of certain information ("market share") would "allow a competitor to better estimate *even more confidential information*," such as "production capacity and manufacturing specifics." *Sharkey v. FDA*, 250 F. App'x 284, 290 (11th Cir. 2007) (emphasis added). By "more confidential," the party meant the information's disclosure was more likely to produce "very real ... harm." *Ibid.* Likewise, a court used the term "highly confidential" to refer to the "important and sensitive" nature of information. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1265 (7th Cir. 1995). This Court has done the same, referring to the "relationships of many" intelligence officers "to our Government" as "highly confidential" because of the likely harm of releasing that information: Many such officers, the Court explained, "are still engaged in intelligence gathering." *Haig v. Agee*, 453 U.S. 280, 283 (1981).

Real-World Usages: Statutes and Rules. Statutes and rules provide similar insight. Federal Rule of Criminal Procedure 17(c) requires court approval to serve a subpoena requesting "confidential information about a victim." The Advisory Committee Notes for this recent amendment strongly suggest it requires an assessment of sensitivity. Rather than make the standard turn on whether the victim has kept that information secret, the Advisory Committee left the term "'confidential information' ... to case development," while providing some illustrations of sensitive materials that qualify regardless of the victim's

confidentiality practices: "such things as medical or school records." Fed. R. Crim. Proc. 17(c), advisory committee note to 2008 amendment.

Similarly, under the executive order barring disclosure of certain sensitive national-security information, information is "confidential" if "its unauthorized disclosure could reasonably be expected to cause ... damage to the national security." Exec. Order No. 11652, 37 Fed. Reg. 5209 (Mar. 8, 1972). Likewise, statutes equate "sensitive information" with "confidential commercial ... information." 10 U.S.C. §129d; *see also, e.g.*, 31 U.S.C. §3553 (referring to "sensitive information" and "other ... confidential" information); 49 U.S.C. §24322 (referring to "confidential" and "other ... sensitive information"). By contrast, where statutes adopt petitioner's broader interpretation, they typically say things like "kept confidential," "held ... confidential," or "designated as confidential." *E.g.*, 15 U.S.C. §57b-2; 7 U.S.C. §2619; 7 U.S.C. §4912.

Petitioner is thus simply wrong in contending that the plain language mandates reading Exemption 4 as looking to whether the private party kept the information secret, as opposed to the objective confidential nature of the information.

2. Analogous disclosure regimes also require consideration of harm when evaluating confidentiality.

Reading Exemption 4 to require a showing of harm from disclosure is further buttressed by analogous areas of law, where courts similarly require a

showing of harm before blocking release of information to the public or another party. Sometimes courts derive this requirement from the word "confidential" alone; sometimes other language reinforces the need for a showing of harm. The relevant point is that there is a clear norm in the law that bare secrecy is insufficient to justify nondisclosure.

Judicial-Sealing Standards. Judicial-sealing practices are especially instructive because, just as FOIA exists to safeguard the common-law right "to inspect and copy public records," sealing rules safeguard the corresponding right "to inspect and copy ... judicial records." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Thus, in applying sealing rules that restrict the public filing of "confidential documents," state and federal courts require parties seeking to seal records to "identify a ... serious injury that would occur from disclosure." Laurie Kratky Doré, *Public Courts Versus Private Justice*, 81 Chi.-Kent L. Rev. 463, 475 & nn.64-65 (2006) (collecting examples); *e.g.*, 11 U.S.C. §107(b)(1) ("bankruptcy court shall ... protect an entity with respect to a trade secret or confidential ... commercial information"). Courts have long refused "to permit their files to serve ... as sources of business information that might harm a litigant's competitive standing." *Nixon*, 435 U.S. at 598.

For instance, in *In re Orion Pictures Corp.*, applying the bankruptcy-court sealing rule at §107(b)(1), the court held "confidential ... commercial information" is information that "would cause an unfair advantage to competitors." 21 F.3d 24, 27 (2d Cir. 1994) (quotations marks omitted). *See also, e.g., Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d

157, 167 (3d Cir. 1993) (sealing must be based on "*evidence* to show how public dissemination ... would cause the competitive harm"); *Mosallem v. Berenson*, 76 A.D.3d 345, 350 (N.Y. App. Div. 2010) ("In the business context, we have allowed for sealing ... where the release of documents could threaten a business's competitive advantage.").[21]

Discovery and Subpoena Practices. The Federal Rules of Civil Procedure twice reference "confidential" information: in Rule 26(c)(1)(G), authorizing courts to issue protective orders against discovery pertaining to "confidential ... commercial information," and again in Rule 45(d)(3)(B)(i), authorizing courts to quash a subpoena when it would require "disclosing a trade secret or other confidential ... commercial information." Both require the moving party to show "it would be harmed by [the] disclosure." 8A C. Wright & A. Miller, FED. PRAC. & PROC. CIV. §2043 (3d ed. 2018); *see also* Fed. R. Civ. P. 45, advisory committee note to 1991 amendment ("confidential" has same meaning as under Rule 26).

As this Court has held, these rules reflect the common law, which "recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information." *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979); *see*

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[21] *See also, e.g., Clear Channel Commc'ns, Inc. v. United Servs. Auto. Ass'n*, 195 S.W.3d 129, 136 (Tex. Ct. App. 2006); *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1225 (Fed. Cir. 2013); *Doe v. Doe*, ___ S.E.2d ___, 2018 WL 6613818, at *17 (N.C. Ct. App. Dec. 18, 2018); *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 451 (5th Cir. 2019).

also Fed. R. Civ. P. 26, advisory committee note to 1970 amendment ("new reference to trade secrets and other confidential commercial information" was intended to "reflect[] existing law."); Fed. R. Civ. P. 45, advisory committee note to 1991 amendment (same). The key word is "*qualified*." Protection was not "automatic and complete." 443 U.S. at 362 (quotation marks omitted). Courts "have in each case weighed the[] claim to privacy against" "the sensitivity of the commercial secrets involved, and the harm ... [from] disclosure." *Id.* at 362-363 (quotation marks omitted).

Thus, in analogous areas of law, bare secrecy is insufficient to justify nondisclosure. Exemption 4 is properly construed in light of that norm.

3. The legislative history does not support petitioner's reading.

Petitioner's reliance on legislative history (Pet. Br. 22-23) is unavailing. As an initial matter, FOIA's legislative history is notoriously flawed, Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 789-90 (1967)—even "tortured, not to say obfuscating," *9 to 5 Org.*, 721 F.2d at 6 (quotation marks omitted). It is exactly the sort of "murky" history that has led this Court and its members to caution against "excursions ... into the swamps of legislative history." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Lawson v. FMR LLC*, 571 U.S. 429, 459 (2014) (Scalia, J., concurring).

As to the specific history cited here, petitioner relies primarily on a single statement in the House and Senate Reports: that information is "confidential" if it

"would customarily not be released to the public by the person from whom it was obtained." Pet. Br. 22-23 (citing S. Rep. No. 89-813, at 9 (1965); H.R. Rep. No. 89-1497, at 10 (1965)). However, that quoted snippet was recycled from reports issued on the FOIA bill from the *prior year*, which unlike the final law, expressly used the word "customarily." It read: "trade secrets and other information obtained from the public and customarily privileged or confidential." S. 1666, 88th Cong. §3 (1964) (1964). When the word "customarily" was removed from the bill, the "Senate committee simply failed to alter its earlier report," and "the House committee seven months later copied most of the Senate committee report." Davis, *supra*, at 790.

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Petitioner's view—that "confidential" "unambiguous[ly]" means "private and not publicly disclosed," Pet. Br. 13—is a mirage. Petitioner presents this as a simple dictionary-driven case only by misreading the dictionaries it relies on, eliding common parlance and real-world examples, and misunderstanding this Court's decision in *Landano*—to say nothing of disregarding the common law and Congress' repeated ratification of the uniform judicial interpretation of Exemption 4.

D. Petitioner's standard would do serious damage to FOIA's core objective of shedding light on government spending, enforcement, and other actions.

FOIA expands on rights both constitutional and deeply rooted in the law. While "there is no constitutional right to obtain all the information provided by FOIA," *McBurney v. Young*, 569 U.S. 221, 232 (2013), the ability of the people to "know what [their] Government is up to" is a "structural necessity in a real democracy," *Favish*, 541 U.S. at 171-73. FOIA gives legislative effect to Justice Brandeis's famous maxim, "[s]unlight is ... the best of disinfectants." Louis D. Brandeis, OTHER PEOPLE'S MONEY 92 (1914). FOIA also builds on the common-law right "to inspect and copy public records," *Nixon*, 435 U.S. at 597, and among other things, helps to make transparent how the Government spends the people's money, furthering the Constitution's guarantee that "regular statement[s] ... of all public money shall be published," U.S. Const. art. I, §9, cl. 7.

Petitioner's reading of Exemption 4 threatens serious damage to FOIA's core objective of shedding light on "what [the] Government is up to." It would hamstring the public's ability to find out how the Government is spending the public's money and whether and how the Government is abusing, or failing to exercise, its vast regulatory authority. In short, if a private-party submitter may object to disclosure of government records merely because they contain information the submitter has unilaterally chosen to

keep secret, it will be very hard to expose government waste, fraud, and abuse.

Numerous examples illustrate as much. One notorious episode involved toilet seats purchased by the Navy for $640 apiece. The story started a national political conversation about wasteful government spending and led to further investigations that focused public attention on the subject for years to come.[22] Like many such stories on wasteful government spending, the toilet-seat tale began as a FOIA request.[23] In petitioner's view, however, the $640 toilet-seat contractor would have had a successful Exemption 4 objection to release of the contract price, merely because it necessarily contained pricing information the contractor had treated as secret.

Similar public-spending revelations obtained through FOIA are legion. We note just a few here. In each, the effect of petitioner's construction of Exemption 4 is plain. None of the private parties at issue had publicized the information, and presumably none would agree to if given a choice:

- Fox News' request for information about the banks receiving 2008 bailout funds—including "the names of the borrowing banks, the amount they borrowed, and the collateral pledged," *Fox*

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[22] William D. Hartung, *Only the Pentagon Could Spend $640 on a Toilet Seat*, The Nation, Apr. 11, 2016, http://tinyurl.com/jv2yuxa.

[23] Mike Ward, *It's Your Information: How a Federal Law Has Turned Citizens into Giant Slayers*, Austin American–Statesman, Oct. 6, 1996, at H1.

News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 158, 159 (2d Cir. 2010);

- A request for a controversial pitch memo by BP written to government agencies in an attempt to retain myriad government contracts following the Gulf oil spill;[24]

- A front-page story that a local public-school system was charged massively inflated fees for certain maintenance contracts;[25]

- And a report that FEMA paid nearly $75 million to Carnival Cruise Lines to house post-hurricane workers, even though the company "hosted less than half the federal workers than was agreed to."[26]

This case is of a piece. As explained at the outset, the Argus Leader sought SNAP-spending data to assist the newspaper's investigation of potential fraud.

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[24] Jason Leopold, *How BP Lobbied the EPA to Let it Continue Being a 'Business Partner of the Government,'* Vice News, Nov. 12, 2014, http://tinyurl.com/y499x95d.

[25] Justin Blum, *Energy Contract Used to Repair D.C. Schools; No-Bid Agreement Pays Utility Millions*, Wash. Post, Apr. 23, 2001, at A1.

[26] Daniel Rivero, *FEMA Paid Millions For Half-Empty 'Floating Hotel' After Hurricane Maria*, WLRN, May 30, 2018, https://tinyurl.com/y2wxkmar.

In addition to keeping spending abuses and fraud from the scrutiny of the press and public, petitioner's interpretation would also threaten efforts to understand whether the Government is properly wielding its tremendous powers to enforce the law. To know whether the Government is effectively regulating private parties, it is important to know what the Government is requiring them to submit and what it is learning from their submissions. Examples include:

- A request for information collected from private parties by the CFPB in a 2015 study of arbitration practices that led the agency to issue a controversial rule prohibiting arbitration clauses in consumer-financial contracts, *Cause of Action Inst. v. CFPB*, No. 16-2434 (D.D.C. Dec. 13, 2016), Dkt. 1;

- An advocacy organization's request for certain documents considered by the FDA in approving mifepristone (the "medical abortion" drug), *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006);

- And another organization's request for records related to the safety of FDA-approved cataract-implantation devices, *Pub. Citizen Health*, 704 F.2d 1280.

Without addressing the compelling interests against reading Exemption 4 as petitioner proposes, petitioner alleges just two counterweights. Neither has merit.

First, petitioner argues the longstanding judicial interpretation of Exemption 4 has proved "unworkable," yielding multiple circuit "splits" and requiring "case-by-case" factbound analysis. Pet. Br. 41-44. As an initial matter, there is nothing unusual about a legal standard generating occasional circuit conflicts or requiring case-specific application to facts. And as explained below, pp. 61-63, petitioner's administrability concerns are addressed by looking to the way courts have historically dealt with similar issues at common law. In any case, the claimed tension in the case law is exaggerated. *See* Brief in Opposition 17-25.

The same is true of the suggestion that Exemption 4 produces sprawling litigation. The overwhelming majority of FOIA requests are resolved efficiently at the administrative level. Indeed, less than one-tenth of 1% of FOIA requests turn into litigation.[37] Of those, very few cases even get to discovery and, in the almost 30 years between 1979 and 2008, there were just 88 FOIA trials (fewer than three per year). Margaret Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 246-47, 255-57 (2011).

Petitioner suggests that, in the agency review process, the agency is required to guess about the likelihood of competitive harm. Pet. Br. 48. That is incorrect. Regulations require "prompt notice" to a private-party submitter when an agency receives a FOIA request for information that party submitted. *E.g.*, 28

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[37] *See* U.S. Dep't of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2017*, at 4 (2017), http://tinyurl.com/y4z6pz64; The FOIA Project, FOIA Lawsuits, http://tinyurl.com/yyngpfs5.

C.F.R. §16.7. At that point, the submitter has an opportunity to explain to the agency exactly why the disclosure would cause it competitive harm. *See Acumenics Research*, 843 F.2d at 805 (explaining this system).

Finally, if a competitive-harm standard was in fact difficult to administer, as petitioner claims, it is unlikely states would require a competitive-harm showing under their state-law versions of Exemption 4. But numerous states do. *E.g.*, Ark. Code Ann. §25-19-105(b)(9)(A) ("[f]iles that ... would give advantage to competitors"); Tex. Gov't Code §552.110(b) (similar); N.Y. Pub. Off. Law §87(2)(d) (similar); Utah Code Ann. §63G-2-305(2) (similar); Iowa Code Ann. §22.7(6) (similar); Neb. Rev. Stat. §84-712.05(3) (similar).

Second, petitioner contends that "commercial for-profit interests have dominated FOIA requests." Pet. Br. 34. But that would be a feature, not a bug, of FOIA's design, which entitles all members of the public—corporations and non-profits, entrepreneurs and journalists alike—to learn what their Government is up to. Small businesses, for example, might use FOIA to level the playing field, learning whether the Government is unfairly favoring larger, better-connected government contractors. It is profoundly inaccurate to suggest most commercial users of FOIA are illegitimately using the statute to obtain a competitive advantage. In fact, leading FOIA scholar Margaret Kwoka, the author of the statistical analysis petitioner cites, confirms "the vast majority of all commercial FOIA requests are seeking ... routine records"

(things like FDA inspection reports and recent contract bids that agencies could "easily" post on "accessible, searchable" databases), rather than competitively damaging information. *FOIA, Inc.*, 65 Duke L.J. 1361, 1365, 1430-36 (2016).

FOIA protects the right of the people to know how the Government is spending their money and whether it is abusing its regulatory authority. Petitioner's alternative, which focuses on the submitter's unilateral practice of keeping information secret, would improperly conceal that vital information.

E. The Solicitor General's alternative definition of "confidential" also lacks merit.

For its part, the Solicitor General's brief offers multiple interpretations of "confidential."

SG Interpretation #1. The Solicitor General's brief begins with petitioner's interpretation, contending "confidential" means "kept secret by those who convey it to the government." U.S. Br. 14. But then, as discussed above (p. 44) in addressing this Court's *Landano* decision, the Government pivots, acknowledging that sometimes—including in this case—the fact that "information is not customarily released ... by" a private party is "insufficient in itself to render it 'confidential.'" U.S. Br. 24. Analysis of Exemption 4 "must also take into account the context in which that information appears" to assess whether the provider's "expectation of confidentiality would be objectively reasonable." U.S. Br. 25.

That, however, *supports* the longstanding rule, requiring an objective assessment of the nature of the information, *i.e.*, whether the information is "confidential in nature." At a minimum, the Solicitor General's brief shows that reading "confidential" to turn on the objective nature of the information is *not* contrary to the plain language of the statute.

SG Interpretation #2. The Solicitor General also argues for an alternative definition: commercial information should be deemed "confidential" if the "statements or actions" of a government official could be "reasonably understood to show that the government will not publicly disclose it." U.S. Br. 15.

That would give a government official, even a low-ranking one, the power to freely exempt commercial information by simply providing an express or implied assurance that the information will not be disclosed under FOIA. In enacting FOIA, however, Congress removed the Government's unchecked discretion to shield documents from disclosure. *See Mink*, 410 U.S. at 79. Judicial review under FOIA is "de novo," 5 U.S.C. §552(a)(4)(A)(vii), with no deference to agency interpretations, *e.g.*, *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1115 (D.C. Cir. 2015).

That represented a major shift from pre-FOIA law, where agencies could withhold "information confidential for good cause found." 5 U.S.C. §1002(c) (1964). This Court has thus criticized interpretations of FOIA exemptions that would afford an agency "unlimited" authority to "withhold[] ... files merely by classifying them" as FOIA-exempt. *FBI v. Abramson*, 456 U.S. 615, 621-22 (1982) (characterizing as

"sweeping" the notion, accepted by some lower courts before Congress intervened to amend FOIA, that the Government could simply classify files as "investigatory" and thereby subject them to Exemption 7).

The Solicitor General's proposal here is inconsistent with FOIA's basic premises and recalls the prior era of unlimited withholding discretion. In the Government's view, an agency official's assurance that commercial information will not be disclosed is controlling, even if that assurance was neither authorized nor rooted in the nature of the information (such that there would be an objectively reasonable basis for treating the information as confidential). Here, for example, the Solicitor General says USDA's assurances are sufficient to exempt the SNAP data "[e]ven if USDA's underlying reasons for its assurances were [legally] incorrect." U.S. Br. 30. Further, the Solicitor General acknowledges there was no reasonable expectation of confidentiality given the nature of the information—public-spending data, essential to an "informed public debate about the expense of government action." U.S. Br. 26.

The Government's reading of Exemption 4 improperly cedes virtually unlimited power to agencies to exempt commercial information from disclosure. That boundless and peremptory view should be rejected.

III. There Is No Basis To Water Down The Longstanding Competitive-Harm Standard.

Petitioner's second question presented asks the Court to reformulate the longstanding competitive-

harm inquiry to look to whether harm was merely "possible" as opposed to likely. Pet. Br. i, 48-49. Petitioner also asks the Court to hold that relevant harm includes "[i]njury to reputation." Pet. Br. 50. These requests are unsound and should be rejected.

First, petitioner's proposals are inconsistent with both the common law and the backdrop understanding Congress has repeatedly ratified. At common law, a mere "possibility" of economic harm has never sufficed to make out a tort claim for unfair competition. Most relevant here, a plaintiff alleging wrongful disclosure of non-public business information must show it "is likely to result in injury." RESTATEMENT (THIRD), UNFAIR COMPETITION §40.[28]

The common law likewise provides objective standards for evaluating whether alleged harm is cognizable. Under the common law, *unfair*-competition liability turns on whether "methods of competition ... *improperly* interfere with ... *legitimate* commercial interests." *See generally* RESTATEMENT (THIRD), UNFAIR COMPETITION, foreword (emphasis added). Under those standards, the risk of mere "bad publicity or embarrassment" would not suffice, as petitioner asserts, Pet. Br. 41, 50. *See, e.g., Monsanto*, 467 U.S. at 1011 n.15 ("value of a trade secret lies in the competitive advantage it gives its owner over competitors," not

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[28] Other well-established grounds for unfair-competition liability require a similar showing. *E.g.*, RESTATEMENT (THIRD), UNFAIR COMPETITION §20 ("*likelihood* of confusion" for trademark infringement (emphasis added)); *id.* §2 (deceptive marketing requires representation that "is *likely* to deceive" (emphasis added)).

any protection from embarrassing information such as "harmful side effects of [its] product"); *In re Bolster*, 59 Wash. 655, 658 (1910) (that disclosure would be "embarrassing[] to ... a corporation" did not render its documents "privileged as trade secrets").

Moreover, the longstanding test Congress has repeatedly ratified requires a showing that competitive harm is "likely." *Supra* pp. 24-25 n.10. Once Congress has ratified a judicial construction, only Congress may modify it. *See Helsinn*, 139 S.Ct. at 634.

Second, petitioner vastly overstates the burden under the longstanding competitive-harm test. Proving harm is "likely" to result does not require, as petitioner suggests, "demonstrating a precisely defined competitive harm," Pet. Br. 49, proving that harm will "immediately result," *ibid.*, or showing to a "near certainty" that harm will result, Pet. i. The cases petitioner cites do not hold otherwise; they straightforwardly apply the longstanding likelihood standard to different factual settings.[29] That a "legal doctrine phrased in terms of what is ... 'likely'" sometimes yields results "subject to some debate" is no reason to jettison the standard. *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting). It

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[29] *E.g.*, *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) ("party invoking Exemption 4 [need not] prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so"); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (similar).

is commonplace to have standards that call for the exercise of case-specific legal judgment.

Third, and finally, this is not the proper case to consider modification of the longstanding competitive-harm standard because the result here would be no different under petitioner's proposal. As the district court concluded after weighing the evidence—including the snippets of trial testimony petitioner selectively quotes, Pet. Br. 51-53—"any potential competitive harm from the release of the requested SNAP data is speculative at best." Pet. App. 19a. Further, there was no "evidence in the record" of reputational harm. Pet. App. 5a.

Petitioner's proposed modification of the longstanding competitive-harm standard is thus neither correct nor properly presented in this case.

IV. The Requested Government-Spending Data Is Not Encompassed By Exemption 4.

Exemption 4 is limited to commercial or financial information "obtained from a person." That is why petitioner consistently frames its favored standard as whether the information "would customarily not be released ... *by the person from whom it was obtained.*" Pet. Br. 22 (quotation marks omitted) (emphasis added); *id.* at 24 (similar); *id.* at 30 (similar).

But records of government funds transferred to SNAP-participating retailers are not "obtained" from the retailers. The Government and its contractor payment-processors make and record the determination

whether a SNAP account is valid and contains sufficient funds. *Supra* pp. 4-5, 19-20. That is why the district court held the information sought is "'obtained' from third-party payment processors, not from individual retailers." Pet. App. 15a-16a. Petitioner did not seek review of that determination. Pet. App. 2a n.2 (noting "neither party contest[ed] that finding on appeal").

Even if this Court chose to revisit the ruling on this question, the only possible sources of government-spending records could be the payment processor, as the Eighth Circuit held, or the Government itself. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147-49 (2d Cir. 2010) (holding information about Federal Reserve loans was not "obtained from" the private loan applicants because they were records of "the agency's own executive actions").

Argus Leader seeks records of the Government's consummated SNAP transactions: funds approved by the Government and transferred to private retailers. As discussed above pp. 4-5, 19-20, records of those transfers did not come into existence until the SNAP account was deemed valid and funds were released. For this additional reason, the data here is not exempt from disclosure.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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Statutory Appendix

APPENDIX A

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APPENDIX B

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APPENDIX A

FOIA AND SECTION 2018

5 U.S.C. §552

§552. Public information; agency rules, opinion, order, records, and proceedings

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(b) This section does not apply to matters that are—

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(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

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(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

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7 U.S.C. §2018

§2018. Approval of retail food stores and wholesale food concerns

(a) Authorization to accept and redeem benefits

(1) Applications

(A) In general

Regulations issued pursuant to this chapter shall provide for the submission of applications for approval by retail food stores and wholesale food concerns which desire to be authorized to accept and redeem benefits under the supplemental nutrition assistance program and for the approval of those applicants whose participation will effectuate the purposes of the supplemental nutrition assistance program.

(B) Factors for consideration

In determining the qualifications of applicants, there shall be considered among such other factors as may be appropriate, the following:

(i) the nature and extent of the food business conducted by the applicant;

(ii) the volume of benefit transactions which may reasonably be expected to be conducted by the applicant food store or wholesale food concern;

(iii) whether the applicant is located in an area with significantly limited access to food;

(iv) any information, if available, about the ability of the anticipated or existing electronic benefit transfer equipment and service provider of the applicant to provide sufficient information through the electronic benefit transfer system to

minimize the risk of fraudulent transactions; and

(v) the business integrity and reputation of the applicant.

(C) Certificate

Approval of an applicant shall be evidenced by the issuance to such applicant of a nontransferable certificate of approval.

(D) Visit required

No retail food store or wholesale food concern of a type determined by the Secretary, based on factors that include size, location, and type of items sold, shall be approved to be authorized or reauthorized for participation in the supplemental nutrition assistance program unless an authorized employee of the Department of Agriculture, a designee of the Secretary, or, if practicable, an official of the State or local government designated by the Secretary has visited the store or concern for the purpose of determining whether the store or concern should be approved or reauthorized, as appropriate.

(2) The Secretary shall issue regulations providing for—

(A) the periodic reauthorization of retail food stores and wholesale food concerns; and

(B) periodic notice to participating retail food stores and wholesale food concerns of the

definitions of "retail food store," "staple foods," "eligible foods," and "perishable foods."

(3) Authorization periods

The Secretary shall establish specific time periods during which authorization to accept and redeem benefits shall be valid under the supplemental nutrition assistance program.

(4) Electronic benefit transfer equipment and service providers

Before implementing clause (iv) of paragraph (1)(B), the Secretary shall issue guidance for retail food stores on how to select electronic benefit transfer equipment and service providers that are able to meet the requirements of that clause.

(b) Effective and efficient operation of program; effect of disqualification; posting of bond

(1) No wholesale food concern may be authorized to accept and redeem benefits unless the Secretary determines that its participation is required for the effective and efficient operation of the supplemental nutrition assistance program. No co-located wholesale-retail food concern may be authorized to accept and redeem benefits as a retail food store, unless (A) the concern does a substantial level of retail food business, or (B) the Secretary determines that failure to authorize such a food concern as a retail food store would cause hardship to households that receive supplemental nutrition assistance program benefits. In addition, no firm may be

authorized to accept and redeem benefits as both a retail food store and as a wholesale food concern at the same time.

(2)(A) A buyer or transferee (other than a bona fide buyer or transferee) of a retail food store or wholesale food concern that has been disqualified under section 2021(a) of this title may not accept or redeem benefits until the Secretary receives full payment of any penalty imposed on such store or concern.

(B) A buyer or transferee may not, as a result of the sale or transfer of such store or concern, be required to furnish a bond under section 2021(d) of this title.

(c) Information submitted by applicants; safeguards; disclosure to and use by State agencies

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, purchase invoices, records relating to electronic benefit transfer equipment and related services, transaction and redemption data provided through the electronic benefit transfer system, or program-related records, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. The regulations may require retail food stores and wholesale food concerns to provide written

authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter, except that such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C.A. §1786], for purposes of administering the provisions of that Act [42 U.S.C.A. §1771 et seq.] and the regulations issued under that Act. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such

information by the Comptroller General of the United States authorized by any other provision of law.

(d) Hearing upon failure of applicant to receive approval; waiting period for new application

Any retail food store or wholesale food concern which has failed upon application to receive approval to participate in the supplemental nutrition assistance program may obtain a hearing on such refusal as provided in section 2023 of this title. A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval established by the Secretary may not, for at least 6 months, submit a new application to participate in the program. The Secretary may establish a longer time period under the preceding sentence, including permanent disqualification, that reflects the severity of the basis of the denial.

(e) Reporting of abuses by public

Approved retail food stores shall display a sign providing information on how persons may report abuses they have observed in the operation of the supplemental nutrition assistance program.

(f) Limitation on participation of house-to-house trade routes

In those areas in which the Secretary, in consultation with the Inspector General of the Department of Agriculture, finds evidence that the operation of house-to-house trade routes damages the program's

integrity, the Secretary shall limit the participation of house-to-house trade routes to those routes that are reasonably necessary to provide adequate access to households.

(g) EBT service requirement

An approved retail food store shall provide adequate EBT service as described in section 2016(h)(3)(B) of this title.

(h) Private establishments

(1) In general

Subject to paragraph (2), no private establishment that contracts with a State agency to offer meals at concessional prices as described in paragraphs (3), (4), and (9) of section 2012(k) of this title may be authorized to accept and redeem benefits unless the Secretary determines that the participation of the private establishment is required to meet a documented need in accordance with section 2020(e)(25) of this title.

(2) Existing contracts

(A) In general

If, on the day before February 7, 2014, a State has entered into a contract with a private establishment described in paragraph (1) and the Secretary has not determined that the participation of the private establishment is necessary to meet a documented need in accordance with section 2020(e)(25) of this title,

the Secretary shall allow the operation of the private establishment to continue without that determination of need for a period not to exceed 180 days from the date on which the Secretary establishes determination criteria, by regulation, under section 2020(e)(25) of this title.

(B) Justification

If the Secretary determines to terminate a contract with a private establishment that is in effect on February 7, 2014, the Secretary shall provide justification to the State in which the private establishment is located for that termination.

(3) Report to Congress

Not later than 90 days after September 30, 2014, and 90 days after the last day of each fiscal year thereafter, the Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report on the effectiveness of a program under this subsection using any information received from States under section 2020(e)(25) of this title as well as any other information the Secretary may have relating to the manner in which benefits are used.

(i) Review of program operations

(1) Review by the Secretary

The Secretary—

(A) shall review a representative sample of currently authorized facilities referred to in section 2012(k)(3) of this title to determine whether benefits are properly used by or on behalf of participating households residing in such facilities and whether such facilities are using more than 1 source of Federal or State funding to meet the food needs of residents;

(B) may carry out similar reviews for currently participating residential drug and alcohol treatment and rehabilitation programs, and group living arrangements for the blind and disabled, referred to in section 2012(k) of this title;

(C) shall gather information, and such facilities, programs, and arrangements shall be required to submit information deemed necessary for a full and thorough review; and

(D) shall report the results of these reviews to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate not later than 18 months after December 20, 2018, along with recommendations regarding—

(i) any additional requirements or oversight that would be appropriate for such facilities, programs, and arrangements; and

(ii) whether such facilities, programs, and arrangements should continue to be authorized to participate in the supplemental nutrition assistance program.

(2) Limitation

Nothing in this subsection shall authorize the Secretary to deny any application for continued authorization, any application for authorization, or any request to withdraw the authorization of any such facility, program, or arrangement based on a determination that residents of any such facility or entity are residents of an institution for a period of 18 months from December 20, 2018.

(j) Incentives

(1) Definition of eligible incentive food

In this subsection, the term "eligible incentive food" means—

(A) a staple food that is identified for increased consumption, consistent with the most recent dietary recommendations; and

(B) a fruit, vegetable, dairy, whole grain, or product thereof.

(2) Guidance

(A) In general

The Secretary shall issue guidance to clarify the process by which an approved retail food store may seek a waiver to offer an incentive, which may be used only for the purchase of an eligible incentive food at the point of purchase, to a household purchasing food with benefits issued under this chapter.

(B) Guidance

The guidance under subparagraph (A) shall establish a process under which an approved retail food store, prior to carrying out an incentive program under this subsection, shall provide to the Secretary information describing the incentive program, including—

(i) the types of incentives that will be offered;

(ii) the types of foods that will be incentivized for purchase; and

(iii) an explanation of how the incentive program intends to support meeting dietary intake goals.

(3) No limitation on benefits

A waiver granted under this subsection shall not be used to carry out any activity that limits the use of benefits under this chapter or any other Federal nutrition law.

(4) Effect

Guidance provided under this subsection shall not affect any requirements under section 7517 of this title, including the eligibility of a retail food store to participate in a project funded under such section.

(5) Report

The Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry

of the Senate an annual report describing the types of incentives approved under this subsection.

APPENDIX B

RATIFICATION STATUTES

5 U.S.C. §552b, Pub. L. 94-409, Sept. 13, 1976, 90 Stat. 1241-42.

§552b. Open meetings

***

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

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(4) disclose trade secrets and **commercial or financial information obtained from a person and privileged or confidential**;

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7 U.S.C. §608d, Pub. L. No. 99-198, Dec. 23, 1985, 99 Stat. 1631.

§608d. Books and records

***

(2) ... [A]ll information furnished to or acquired by the Secretary of Agriculture pursuant to this section, as well as information for marketing order programs **that is categorized as trade secrets and commercial or financial information exempt under section 552(b)(4) of Title 5 from disclosure under section 552 of such Title**, shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired.

*****

7 U.S.C. §1508, Pub. L. 106-224, June 20, 2000, 114 Stat.392.

§1508. Crop insurance

***

(h) Submission of policies and materials to Board

***

(4) Guidelines for submission and review

***

(ii) Standard of confidentiality

If information concerning a proposal could be withheld by the Secretary [of Agriculture] under the standard for privileged or confidential information pertaining to trade secrets **and commercial or financial information under section 552(b)(4) of Title 5**, the information shall not be released to the public.

*****

7 U.S.C. §1523, Pub. L. 113-79, Feb. 7, 2014, 128 Stat. 976.

§1523. Pilot programs

***

(i) Underserved crops and regions pilot programs

***

(2) Authorization

Notwithstanding subsection (a)(2), the [Federal Crop Insurance] Corporation may conduct 2 or more pilot programs to provide producers of underserved specialty crops and livestock commodities with index-based weather insurance, subject to the

requirements of this section.

(3) Review and approval of submissions

(A) In general

The Board [of the Corporation] shall approve 2 or more proposed policies or plans of insurance from approved insurance providers if the Board determines that the policies or plans provide coverage as specified in paragraph (2), and meet the conditions described in this paragraph.

***

(6) Confidentiality

***

(B) Standard

If information concerning a proposal could be withheld by the Secretary [of Agriculture] **under the standard for privileged or confidential information pertaining to trade secrets and commercial or financial information under section 552(b)(4) of Title 5**, the information shall not be released to the public.

*****

7 U.S.C. §2143, Pub. L. 99-198, Dec. 23, 1985, 99 Stat 1646.

§2143. Standards and certification process for humane handling, care, treatment, and transportation of animals

***

(a) Promulgation of standards, rules, regulations, and orders; requirements; research facilities; State authority

***

(6)(B) No rule, regulation, order, or part of this chapter shall be construed to require a research facility to disclose publicly or to the Institutional Animal Committee during its inspection, **trade secrets or commercial or financial information which is privileged or confidential**.

*****

7 U.S.C. §5662, Pub. L. 101-624, Nov. 28, 1990, 104 Stat. 3681.

§5662. Compliance provisions

***

(a) Records

(1) In general

In the administration of the [export] programs established under sections 5621, 5622, and 5623(b) of this title the Secretary [of Agriculture] shall require by regulation each exporter or other participant under the program to maintain all records concerning a program transaction for a period of not to exceed 5 years after completion of the program transaction, and to permit the Secretary to have full and complete access, for such 5-year period, to such records.

***

(2) Confidentiality

The personally identifiable information contained in reports under subsection (a) may be withheld **in accordance with section 552(b)(4) of Title 5.** Any officer or employee of the Department of Agriculture who knowingly discloses confidential information as defined by section 1905 of Title 18 shall be subject to section 1905 of Title 18. Nothing in this subsection shall be construed to authorize the withholding of information from Congress.

*****

7 U.S.C. §6304, Pub. L. 101-624, Nov. 28, 1990, 104 Stat. 3897.

§6304. Required terms in orders

***

(q) Books and records of first purchasers and certain producers

(1) Recordkeeping

(A) In general

[USDA's order establishing a board to promote the soybean industry] shall require that each first purchaser of soybeans and any person processing soybeans of that person's own production maintain and make available for inspection by the [United Soybean] Board or the Secretary such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. The order shall exempt small producers processing soybeans of their own production from such recordkeeping and reporting requirements if they are not required to pay assessments under the order.

***

(2) Use of information

(A) In general

Information maintained under paragraph (1) shall be made available to the Secretary as is appropriate for the administration or enforcement

of this chapter, or any order or regulation issued under this chapter.

***

(3) Confidentiality

(A) In general

Except as otherwise provided in this chapter, **commercial or financial information that is obtained under paragraph (1) or (2) and that is privileged or confidential** shall be kept confidential by all officers and employees of the Department, members of the Board, and agents of the Board.

*****

7 U.S.C. §6407, Pub. L. 101-624, Nov. 28, 1990, 104 Stat. 3919.

§6407. Required terms in orders

***

(i) Books and records of processors

(1) In general

[USDA's order establishing a board to promote the dairy industry] shall require that each fluid milk processor subject to this chapter maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order.

(2) Use of information

Information obtained under paragraph (1) shall be made available to the Secretary as is appropriate for the effectuation, administration, or enforcement of this chapter, or any order or regulation issued under this chapter.

(3) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), **commercial or financial information that is obtained under paragraph (1) or (2) and that is privileged or confidential** shall be kept confidential by all officers and employees of the Department and agents of the [National Processor Advertising and Promotion] Board, and only such information so obtained as the Secretary considers relevant may be disclosed to the public by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order.

*****

10 U.S.C. §2306a, Pub. L. 104-106, Feb. 10, 1996, 110 Stat. 652.

§2306a. Cost or pricing data: truth in negotiations

***

(d) Submission of other information.—

***

(2) Limitations on authority—The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

***

(C) A statement that **any information received relating to commercial items that is exempt from disclosure under section 552(b) of Title 5** shall not be disclosed by the Federal Government.

*****

10 U.S.C. §2367 note, Pub. L. 114-328, Dec. 23, 2016, 130 Stat. 2064-2066.

§2367 note. Pilot Program on Disclosure of Certain Sensitive Information to Federally Funded Research and Development Centers

***

(d) Conditions of Disclosure—Sensitive information may be disclosed under the pilot program only if the federally funded research and development center concerned and its parent organization agree to and acknowledge in the parent organization's contract with the Department of Defense that—[the following conditions limit the center's use of the information].

***

(g) Sensitive Information Defined—In this section, the term 'sensitive information' means **confidential commercial, financial, or proprietary information**, technical data, contract performance, contract performance evaluation, management, and administration data, or other privileged information owned by other contractors of the Department of Defense **that is exempt from public disclosure under section 552(b)(4) of Title 5**, United States Code, or which would otherwise be prohibited from disclosure under section 1832 or 1905 of Title 18, United States Code.

*****

15 U.S.C. §46, Pub. L. 96-252, May 28, 1980, 94 Stat. 374-75.

§46. Additional powers of Commission

***

(f) Publication of information; reports

To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use:

Provided, that the [Federal Trade] Commission shall not have any authority to make public any trade secret **or any commercial or financial information which is obtained from any person and which is privileged or confidential**, except that the Commission may disclose such information (1) to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes, and (2) to any officer or employee of any foreign law enforcement agency under the same circumstances that making material available to foreign law enforcement agencies is permitted under section 57b-2(b) of this title.

*****

15 U.S.C. §2055, Pub. L. 97-35, Aug. 13, 1981, 95 Stat. 713.

§2055. Public disclosure of information

***

(a) Disclosure requirements for manufacturers or private labelers; procedures applicable

***

(1) Nothing contained in this Act shall be construed to require the release of any information described by subsection (b) of section 552 of Title 5 or which is

otherwise protected by law from disclosure to the public.

(2) All information reported to or otherwise obtained by the [Consumer Product Safety] Commission or its representative under this Act which information contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 **or subject to section 552(b)(4) of Title 5** shall be considered confidential and shall not be disclosed.

*****

15 U.S.C. §2055a, Pub. L. 110-314, August 14, 2008, 122 Stat. 3050.

§2055a. Publicly available consumer product safety information database

***

(c) Procedural requirements

***

(C) Confidential matter

(i) In general

If the [Federal Trade] Commission transmits a report [involving harm relating to the use of a consumer product] to a manufacturer or private labeler, the manufacturer or private labeler may review the report for confidential information and request that portions of the report identified as confidential be so designated.

(ii) Redaction

If the Commission determines that the designated information contains, or relates to, a trade secret or other matter referred to in section 1905 of Title 18, or that **is subject to section 552(b)(4) of Title 5**, the Commission shall redact the designated information in the report before it is placed in the database.

*****

†

15 U.S.C. §3710a, Pub. L. 101-189, Nov. 29, 1989, 103 Stat. 1676-77.

§3710a. Cooperative research and development agreements

(a) General authority

Each Federal agency may permit the director of any of its Government-operated Federal laboratories, and, to the extent provided in an agency-approved joint work statement or, if permitted by the agency, in an agency-approved annual strategic plan, the director of any of its Government-owned, contractor-operated laboratories—

(1) to enter into cooperative research and development agreements on behalf of such agency (subject to subsection (c) of this section) with other Federal agencies; units of State or local government; industrial organizations (including corporations, partnerships, and limited partnerships, and

industrial development organizations); public and private foundations; nonprofit organizations (including universities); or other persons (including licensees of inventions owned by the Federal agency); and

(2) to negotiate licensing agreements under section 207 of Title 35, or under other authorities (in the case of a Government-owned, contractor-operated laboratory, subject to subsection (c) of this section) for inventions made or other intellectual property developed at the laboratory and other inventions or other intellectual property that may be voluntarily assigned to the Government.

***

(c) Contract considerations

***

(7)(A) No trade secrets or **commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of Title 5**, which is obtained in the conduct of research or as a result of activities under this chapter from a non-Federal party participating in a cooperative research and development agreement shall be disclosed.

(B) The director, or in the case of a contractor-operated laboratory, the agency, for a period of up to 5 years after development of information that results from research and development activities conducted under this chapter and that would be a trade secret or **commercial or financial**

information that is privileged or confidential if the information had been obtained from a non-Federal party participating in a cooperative research and development agreement, may provide appropriate protections against the dissemination of such information, including exemption from subchapter II of chapter 5 of Title 5.

*****

†

15 U.S.C. §3710a, Pub. L. 104-113, Mar. 7, 1996, 110 Stat. 775-76.

§3710a. Cooperative research and development agreements

(b) Enumerated authority

(1) Under an agreement entered into pursuant to subsection (a)(1), the laboratory may grant, or agree to grant in advance, to a collaborating party patent licenses or assignments, or options thereto, in any invention made in whole or in part by a laboratory employee under the agreement, or, subject to section 209 of Title 35, may grant a license to an invention which is federally owned, for which a patent application was filed before the signing of the agreement, and directly within the scope of the work under the agreement, for reasonable compensation when appropriate.

***

In consideration for the Government's contribution under the agreement, grants under this paragraph shall be subject to the following explicit conditions:

(A) A nonexclusive, nontransferable, irrevocable, paid-up license from the collaborating party to the laboratory to practice the invention or have the invention practiced throughout the world by or on behalf of the Government. In the exercise of such license, the Government shall not publicly disclose trade secrets **or commercial or financial information that is privileged or confidential within the meaning of section 552(b)(4) of Title 5** or which would be considered as such if it had been obtained from a non-Federal party.

*****

†

15 U.S.C. §5103, Pub. L. 100-680, Nov. 17, 1988, 102 Stat. 4074.

§5103. Establishment of scientific research and development program to develop competitive manufacturing technologies and increase energy efficiency in steel and aluminum industries

***

(b) Management plan

Within 6 months after November 17, 1988, the Secretary [of Energy] shall publish an update of the management plan to expand the steel research and

development initiative to include aluminum and to carry out the purposes of this chapter.

***

(4) The Secretary, for a period of up to 5 years after the development of information that—

***

(B) would be a trade secret or **commercial or financial information that is privileged or confidential**, as described in section 5104(a) [see below] of this title, if the information had been obtained from a domestic company,

may provide appropriate protections against the dissemination of such information, including exemption from subchapter II of chapter 5 of Title 5.

*****

15 U.S.C. §5104, Pub. L. 100-680, Nov. 17, 1988, 102 Stat. 4075.

§5104. Protection of proprietary rights [in implementation of steel and aluminum development initiative]

***

(a) Proprietary rights

No trade secrets or **commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of Title 5** which is obtained from a domestic company shall be

disclosed in the conduct of the management plan or research plan, or as a result of activities under this chapter.

*****

†

15 U.S.C. §5308, Pub. L. 101-425, Oct. 15. 1990, 104 Stat. 919.

§5308. Protection of proprietary rights [in implementation of metal casting competitiveness program]

***

(a) Proprietary rights

No trade secrets **or commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of Title 5**, which is obtained from a company as a result of activities under this chapter shall be disclosed.

(b) Commercial information

The Secretary [of Energy], for a period of up to 5 years after the development of information that—

(2) would be a trade secret or **commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of Title 5**, if the information had been obtained from a company,

may provide appropriate protection against the dissemination of such information, including exemption from subchapter II of chapter 5 of Title 5.

*****

15 U.S.C. §8704, Pub. L. 115-254, Oct. 5, 2018, 132 Stat. 3477.

§8704. Required terms in orders

***

(k) Books and records of persons covered by order [concerning initiative to promote the concrete industry]

***

(3) Confidentiality of information

(A) In general

Except as otherwise provided in this paragraph, trade secrets and **commercial or financial information that is privileged or confidential** reported to, or otherwise obtained by the ... the Secretary [of Commerce] ... under this chapter shall not be disclosed by any officers, employees, and agents of the Department.

*****

16 U.S.C. §3844, Pub. L. 107-171, May 13, 2002, 116 Stat. 235.

§3844. Administrative requirements for conservation programs

***

(b) Privacy of personal information relating to natural resources conservation programs

(1) Information received for technical and financial assistance

(A) In general

... information described in subparagraph (B)—

***

(ii) shall not be released to any person or Federal, State, local agency or Indian tribe (as defined by the Secretary) outside the Department of Agriculture.

(B) Information

***

(ii) that is proprietary **(within the meaning of section 552(b)(4) of Title 5)** to the agricultural operation or land that is a part of an agricultural operation of the owner, operator, or producer.

*****

19 U.S.C. §2155, Pub. L. 93-618, Jan. 3, 1975, 88 Stat. 1997.

§2155. Information and advice from private and public sectors

***

(g) Trade secrets and confidential information

(1) Trade secrets and **commercial or financial information which is privileged or confidential**, and which is submitted in confidence by the private sector or non-Federal government to officers or employees of the United States in connection with trade negotiations, may be disclosed upon request to—

***

(C) members of any committee of the House or Senate or any joint committee of Congress who are designated as advisers under section 2211(a)(2) of this title or designated by the chairman of such committee under section 2211(b)(3)(B) of this title and staff members of such committee designated under section 2211(b)(3)(B) of this title, but disclosure may be made under this subparagraph only with respect to trade secrets or commercial or financial information that is relevant to trade policy matters or negotiations that are within the legislative jurisdiction of such committee;

*****

19 U.S.C. §2605, Pub. L. 97-446, Jan. 12, 1983, 96 Stat. 2358.

§2605. Cultural Property Advisory Committee

***

(i) Confidential information

(1) In general

Any information (including trade secrets and **commercial or financial information which is privileged or confidential**) submitted in confidence by the private sector to officers or employees of the United States or to the Committee in connection with the responsibilities of the Committee shall not be disclosed to any person other than to—

(A) officers and employees of the United States designated by the Director of the United States Information Agency;

(B) members of the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate who are designated by the chairman of either such Committee and members of the staff of either such Committee designated by the chairman for use in connection with negotiation of agreements or other activities authorized by this chapter; and

(C) the Committee established under this chapter.

*****

21 U.S.C. §353, Pub. L. 113-54, Nov. 27, 2013, 127 Stat. 631.

§353. Exemptions and consideration for certain drugs, devices, and biological products

***

(e) Licensing and reporting requirements for wholesale distributors; fees; definitions

***

(2) Reporting and database

(A) Reporting

Beginning January 1, 2015, any person who owns or operates an establishment that engages in wholesale distribution shall—

(i) report to the Secretary [of Health and Human Services], on an annual basis pursuant to a schedule determined by the Secretary—

(I) each State by which the person is licensed and the appropriate identification number of each such license; and

(II) the name, address, and contact information of each facility at which, and all trade names under which, the person conducts business; and

(ii) report to the Secretary within a reasonable period of time and in a reasonable manner, as

determined by the Secretary, any significant disciplinary actions, such as the revocation or suspension of a wholesale distributor license, taken by a State or the Federal Government during the reporting period against the wholesale distributor.

(B) Database

Not later than January 1, 2015, the Secretary shall establish a database of authorized wholesale distributors. Such database shall—

(i) identify each authorized wholesale distributor by name, contact information, and each State where such wholesale distributor is appropriately licensed to engage in wholesale distribution;

(ii) be available to the public on the Internet Web site of the Food and Drug Administration; and

(iii) be regularly updated on a schedule determined by the Secretary.

(C) Coordination

The Secretary shall establish a format and procedure for appropriate State officials to access the information provided pursuant to subparagraph (A) in a prompt and secure manner.

(D) Confidentiality

Nothing in this paragraph shall be construed as authorizing the Secretary to disclose any

information that is a trade secret **or confidential information subject to section 552(b)(4) of Title 5**, or section 1905 of Title 18.

*****

21 U.S.C. §355, Pub. L. 110-85, Sept. 27, 2007, 121 Stat. 960.

§355. New drugs

***

(l) Public disclosure of safety and effectiveness data and action package

***

(2) Action package for approval

(A) Action package

The Secretary [of Health and Human Services] shall publish the action package for approval of an application under subsection (b) or section 262 of Title 42 on the Internet Web site of the Food and Drug Administration—

***

(C) Contents

An action package for approval of an application under subparagraph (A) shall be dated and shall include the following:

(i) Documents generated by the Food and Drug Administration related to review of the application.

(ii) Documents pertaining to the format and content of the application generated during drug development.

(iii) Labeling submitted by the applicant.

***

(E) Confidential information

This paragraph does not authorize the disclosure of any trade secret, **confidential commercial or financial information, or other matter listed in section 552(b) of Title 5**.

*****

21 U.S.C. §357, Pub. L. 114-255, Dec. 13, 2016, 130 Stat. 1088.

§357. Qualification of drug development tools

***

(c) Transparency

(1) In general

Subject to paragraph (3), the Secretary [of Health and Human Services] shall make publicly available, and update on at least a biannual basis, on the Internet website of the Food and Drug Administration the following:

***

(3) Applicability

Nothing in this section shall be construed as authorizing the Secretary to disclose any information contained in an application submitted under section 355 of this title or section 351 of the Public Health Service Act that is **confidential commercial or trade secret information subject to section 552(b)(4) of Title 5** or section 1905 of Title 18.

*****

21 U.S.C. §360a-2, Pub. L. 114-255, Dec. 13, 2016, 130 Stat. 1117.

§360a-2. Susceptibility test interpretive criteria for microorganisms

***

(b) Susceptibility test Interpretive Criteria Website

(1) In general

Not later than 1 year after December 13, 2016, the Secretary [of Health and Human Services] shall establish, and maintain thereafter, on the website of the Food and Drug Administration, a dedicated website that contains a list of any appropriate new or updated susceptibility test interpretive criteria standards and interpretive criteria in accordance with paragraph (2) (referred to in this section as the "Interpretive Criteria Website").

***

(5) Trade secrets and confidential information

Nothing in this section shall be construed as authorizing the Secretary to disclose any information that is a trade secret or **confidential information subject to section 552(b)(4) of Title 5**.

*****

21 U.S.C. §360bbb-8, Pub. L. 112-144, July 9, 2012, 126 Stat. 1089.

§360bbb-8. Consultation with external experts on rare diseases, targeted therapies, and genetic targeting of treatments

***

(d) Protection of confidential information and trade secrets

(1) Rule of construction

Nothing in this section shall be construed to alter the protections offered by laws, regulations, and policies governing disclosure of **confidential commercial or trade secret information, and any other information exempt from disclosure pursuant to section 552(b) of Title 5** as such provisions would be applied to consultation with individuals and organizations prior to July 9, 2012.

(2) Consent required for disclosure

The Secretary [of Health and Human Services] shall not disclose **confidential commercial or trade secret information** to an expert consulted under this section without the written consent of the sponsor unless the expert is a special government employee (as defined under section 202 of Title 18) or the disclosure is otherwise authorized by law.

*****

21 U.S.C. §360j, Pub. L. 94-295, May 28, 1976, 90 Stat. 566.

§360j. General provisions respecting control of devices intended for human use

***

(c) Trade secrets

Any information reported to or otherwise obtained by the Secretary [of Health and Human Services] or his representative under section 360c, 360d, 360e, 360f, 360h, 360i, or 374 of this title or under subsection (f) or (g) of this section, **which is exempt from disclosure pursuant to subsection (a) of section 552 of Title 5 by reason of subsection (b)(4)**, shall be considered confidential and shall not be disclosed, and may not be used by the Secretary as the basis for the reclassification of a device from class III to class II or class I or as the basis for the establishment or amendment of a performance standard under section 360d of this title for a device reclassified from class III to class II, except (1) in accordance with subsection (h), and (2) that such information may be disclosed to other officers or employees concerned with carrying out this chapter

or when relevant in any proceeding under this chapter (other than section 360c or 360d of this title).

*****

21 U.S.C. §384, Pub. L. 108-173, Dec. 8, 2003, 117 Stat. 2466.

§384. Importation of prescription drugs

***

(e) Testing

The regulations under subsection (b) shall require—

(1) that testing described in subparagraphs (J) and (L) of subsection (d)(1) be conducted by the importer or by the manufacturer of the prescription drug at a qualified laboratory;

***

(3) may include such additional provisions as the Secretary [of Health and Human Services] determines to be appropriate to provide for the protection of trade secrets **and commercial or financial information that is privileged or confidential**.

*****

21 U.S.C. §387f, Pub. L. 111-31, June 22, 2009, 123 Stat. 1796.

§387f. General provisions respecting control of tobacco products

***

(c) Limited confidentiality of information

Any information reported to or otherwise obtained by the Secretary [of Health and Human Services] or the Secretary's representative under section 387c, 387d, 387g, 387h, 387i, 387j, 387k, or 374 of this title, or under subsection (e) or (f) of this section, **which is exempt from disclosure under subsection (a) of section 552 of Title 5 by reason of subsection (b)(4) of that section** shall be considered confidential and shall not be disclosed, except that the information may be disclosed to other officers or employees concerned with carrying out this subchapter, or when relevant in any proceeding under this subchapter.

*****

21 U.S.C. §387p, Pub. L. 111-31, June 22, 2009, 123 Stat. 1823-24.

§387p. Preservation of State and local authority

***

(a) In general

***

(2) Preemption of certain State and local requirements

(A) In general

No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

(B) Exception

Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. **Information** disclosed to a State under subparagraph (A) **that is exempt from disclosure under section 552(b)(4) of Title 5 shall be treated as a trade secret and confidential information** by the State.

*****

21 U.S.C. §830, Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4313.

§830. Regulation of listed chemicals and certain machines

***

(c) Confidentiality of information obtained by Attorney General; non-disclosure; exceptions

(1) Except as provided in paragraph (2), **any information** obtained by the Attorney General under this section **which is exempt from disclosure under section 552(a) of Title 5, by reason of section 552(b)(4) of such title**, is confidential and may not be disclosed to any person.

*****

22 U.S.C. §2131, Pub. L. 111-145, Mar. 4, 2010, 124 Stat. 59.

§2131. Travel Promotion Act of 2009

***

(b) The Corporation for Travel Promotion

***

(6) Open meetings

Meetings of the board of directors of the Corporation, including any committee of the board, shall be open to the public. The board may, by majority vote, close any such meeting only for the

time necessary to preserve the confidentiality of **commercial or financial information that is privileged or confidential**, to discuss personnel matters, or to discuss legal matters affecting the Corporation, including pending or potential litigation.

*****

22 U.S.C. §6713, Pub. L. 105-277, Oct. 21, 1998, 112 Stat. 2681-866.

§6713. Civil liability of United States

***

(g) "United States confidential business information" defined

In this section [governing, among other things, sanctions against foreign persons for improperly disclosing confidential business information], the term "United States confidential business information" means any trade secrets or **commercial or financial information that is privileged and confidential**—

***

(2) **as described in section 552(b)(4) of Title 5**.

*****

26 U.S.C. §48A, Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 1000-1001.

§48A. Qualifying advanced coal project credit

***

(d) Qualifying advanced coal project program—

(1) Establishment—Not later than 180 days after the date of enactment of this section, the Secretary [of Treasury], in consultation with the Secretary of Energy, shall establish a qualifying advanced coal project program for the deployment of advanced coal-based generation technologies.

(2) Certification—

(A) Application period—Each applicant for certification under this paragraph shall submit an application meeting the requirements of subparagraph (B). An applicant may only submit an application—

***

(B) Requirements for applications for certification—An application under subparagraph (A) shall contain such information as the Secretary may require in order to make a determination to accept or reject an application for certification as meeting the requirements under subsection (e)(1). **Any information** contained in the application shall be protected **as provided in section 552(b)(4) of Title 5, United States Code**.

*****

26 U.S.C. §6110, Pub. L. 94-455, Oct. 4, 1976, 90 Stat. 1660-61.

§6110. Public inspection of written determinations

***

(c) Exemptions from disclosure—Before making any written determination [including a ruling, determination letter, technical advice memorandum, or Chief Counsel advice] or background file document open or available to public inspection under subsection (a), the Secretary [of Treasury] shall delete—

***

(4) trade secrets and **commercial or financial information obtained from a person and privileged or confidential**;

*****

†

33 U.S.C. §2313, Pub. L. 104-303, Oct. 12, 1996, 110 Stat. 3685.

§2313. Collaborative research and development

***

(b) Pre-agreement temporary protection of technology

(1) In general

If the Secretary [of the Army] determines that information developed as a result of research and development activities conducted by the Corps of Engineers is likely to be subject to a cooperative research and development agreement within 2 years of its development and that such information would be a trade secret or **commercial or financial information that would be privileged or confidential** if the information had been obtained from a non-Federal party participating in a cooperative research and development agreement under section 12 of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. §3710a), the Secretary may provide appropriate protection against the dissemination of such information, including exemption from subchapter II of chapter 5 of Title 5, until the earlier of the date the Secretary enters into such an agreement with respect to such technology or the last day of the 2-year period beginning on the date of such determination.

*****

41 U.S.C. §3505, Pub. L. 111-350, Jan. 4, 2011, 124 Stat. 3767-68.

§3505. Submission of other information

***

(b) Limitations on authority—The Federal Acquisition Regulation shall include the following

provisions regarding the types of information that contracting officers may require under subsection (a):

***

(3) Information not to be disclosed—A statement that any **information received relating to commercial items that is exempt from disclosure under section 552(b) of Title 5** shall not be disclosed by the Federal Government.

*****

42 U.S.C. §282 note, Pub. L. 114-255, Dec. 13, 2016, 130 Stat. 1051, 1069.

§282 note. Confidentiality

(b) Confidentiality—Nothing in th[is] ... subsection ... authorizes the Secretary of Health and Human Services to disclose any information that is a trade secret, or **other privileged or confidential information, described in section 552(b)(4) of Title 5, United States Code**, or section 1905 of title 18, United States Code, or be construed to require recipients of grants or cooperative agreements through the National Institutes of Health to share such information.

***

Enhancing the Rigor and Reproducibility of Scientific Research

***

(e) Confidentiality—Nothing in this section authorizes the Secretary of Health and Human Services to disclose any information that is a trade secret, or other privileged **or confidential information, described in section 552(b)(4) of Title 5, United States Code**, or section 1905 of Title 18, United States Code.

*****

42 U.S.C. §287, Pub. L. 114-255, Dec. 13, 2016, 130 Stat. 1064.

§287. National Center for Advancing Translational Sciences

***

(e) Rule of construction

Nothing in this section shall be construed as authorizing the Secretary to disclose any information that is a trade secret, or other privileged or **confidential information subject to section 552(b)(4) of Title 5** or section 1905 of Title 18.

*****

42 U.S.C. 289d, Pub. L. 99-158, Nov. 20, 1985, 99 Stat. 877.

§289d. Animals in research

***

(e) Disclosure of trade secrets or privileged or confidential information

No guideline or regulation promulgated under subsection (a) or (c) may require a research entity to disclose publicly trade secrets or **commercial or financial information which is privileged or confidential**.

*****

42 U.S.C. §300aa-12, Pub. L 101-239, Dec. 19, 1989, 103 Stat 2289.

§300aa-12. Court jurisdiction

***

(d) Special masters

***

(4)(A) Except as provided in subparagraph (B), information submitted to a special master or the court in a proceeding on a petition [relating to the National Vaccine Injury Compensation Program] may not be disclosed to a person who is not a party to the proceeding without the express written consent of the person who submitted the information.

(B) A decision of a special master or the court in a proceeding shall be disclosed, except that if the decision is to include information—

(i) which is trade secret **or commercial or financial information which is privileged and confidential**

*****

42 U.S.C. §1395y, Pub. L. 106-554, Dec. 21, 2000, 114 Stat. 2763A-546.

§1395y. Exclusions from coverage and medicare as secondary payer

***

(j) Nonvoting members and experts

(1) Any advisory committee appointed to advise the Secretary [of Health and Human Services] on matters relating to the interpretation, application, or implementation of subsection (a)(1) of this section shall assure the full participation of a nonvoting member in the deliberations of the advisory committee, and shall provide such nonvoting member access to all information and data made available to voting members of the advisory committee, other than **information that**—

(A) **is exempt from disclosure pursuant to subsection (a) of section 552 of Title 5 by reason of subsection (b)(4) of such section** (relating to trade secrets);

*****

42 U.S.C. §247d-1, Pub. L. 109-417, Dec. 19, 2006, 120 Stat. 2850.

§247d-1. Vaccine tracking and distribution

***

(c) Confidentiality

The information submitted to the Secretary [of Health and Human Services] or its contractors, if any, under this section or under any other section of this chapter related to vaccine distribution information shall remain confidential in accordance with the exception from the public disclosure of trade secrets, **commercial or financial information, and information obtained from an individual that is privileged and confidential, as provided for in section 552(b)(4) of Title 5** and subject to the penalties and exceptions under sections 1832 and 1833 of Title 18 relating to the protection and theft of trade secrets, and subject to privacy protections that are consistent with the regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996. None of such information provided by a manufacturer, wholesaler, or distributor shall be disclosed without its consent to another manufacturer, wholesaler, or distributor, or shall be used in any manner to give a manufacturer, wholesaler, or distributor a proprietary advantage.

*****

42 U.S.C. §247d-5 note, Pub. L. 114-255, Dec. 13, 2016, 130 Stat. 1112.

§247d-5 note. Availability of Data

The Secretary [of Health and Human Services] shall make the data collected pursuant to this subsection public. Nothing in this subsection shall be construed as authorizing the Secretary to disclose any information that is a trade secret or **confidential information subject to section 552(b)(4) of Title 5, United States Code**, or section 1905 of Title 18, United States Code.

*****

42 U.S.C. §7256, Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 932.

§7256. Contracts, leases, etc., with public agencies and private organizations and persons

***

(g) Additional authorities

***

(5) The Secretary [of Energy] may protect from disclosure, for up to 5 years after the date on which the information is developed, **any information** developed pursuant to a transaction under paragraph (1) [providing authority to authorize certain research projects] **that would be protected from disclosure under section**

552(b)(4) of Title 5, if obtained from a person other than a Federal agency.

*****

42 U.S.C. §9122, Pub. L. 96-320, Aug. 3, 1980, 94 Stat. 989.

§9122. Recordkeeping and public access to information

***

(b) Confidential information

Any information reported to or collected by the Administrator [of the National Oceanic and Atmospheric Administration] under this chapter **which is exempt from disclosure pursuant to section 552(b)(4) of Title 5** (relating to trade secrets and **commercial or financial information which is privileged or confidential**) shall not—

(1) be publicly disclosed by the Administrator or by any other officer or employee of the United States, unless the Administrator has—

(A) determined that the disclosure is necessary to protect the public health or safety or the environment against an unreasonable risk of injury, and

(B) notified the person who submitted the information 10 days before the disclosure is to be made, unless the delay resulting from such notice

would be detrimental to the public health or safety or the environment, or

(2) be otherwise disclosed except—

(A)(i) to other Federal and adjacent coastal State government departments and agencies for official use,

(ii) to any committee of the Congress of appropriate jurisdiction, or

(iii) pursuant to court order.

*****

†

42 U.S.C. §13293, Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2905.

§13293. Protection of proprietary information

(a) In general

In the case of activities, including joint venture activities, under this subchapter, and in the case of any existing or future activities, including joint venture activities, related primarily to battery technology for electric motor vehicles under other provisions of law, where the knowledge resulting from research and development activities conducted pursuant to such activities, including joint venture activities, is for the benefit of the participants (particularly domestic companies) that provide financial resources to a project under this subchapter,

the Secretary [of Energy], for a period of up to 5 years after the development of information that—

(1) results from research and development activities conducted under this subchapter; and

(2) would be a trade secret or **commercial or financial information that is privileged or confidential** if the information had been obtained from a participant,

shall, notwithstanding any other provision of law, provide appropriate protections against the dissemination of such information to the public, and the provisions of section 1905 of Title 18 shall apply to such information. Nothing in this subsection provides protections against the dissemination of such information to Congress.

*****

42 U.S.C. §13385, Oct. 24, 1992, Pub. L. 102-486, 106 Stat. 3003.

§13385. National inventory and voluntary reporting of greenhouse gases

***

(b) Voluntary reporting

(1) Issuance of guidelines

Not later than 18 months after October 24, 1992, the Secretary [of Energy] shall, after opportunity for public comment, issue guidelines for the voluntary

collection and reporting of information on sources of greenhouse gases.

***

(3) Confidentiality

Trade secret and **commercial or financial information that is privileged or confidential shall be protected as provided in section 552(b)(4) of Title 5**.

*****

†

42 U.S.C. §15962, Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 753.

§15962. Project criteria

***

(h) Data protection

[T]he Secretary [of Energy] may provide appropriate protections (including exemptions from subchapter II of chapter 5 of Title 5) against the dissemination of information that—

(1) results from demonstration activities carried out under the clean coal power initiative program; and

(2) would be a trade secret **or commercial or financial information that is privileged or confidential** if the information had been obtained from and first produced by a non-Federal party participating in a clean coal power initiative project.

*****

†

42 U.S.C. 17242, Pub. L. 110-140, Dec. 19, 2007, 121 Stat. 1695.

§17242. Commercial insulation demonstration program

(c) Demonstration program

***

(2) Disclosure

The Secretary [of Energy] may, for a period of up to 5 years after an award is granted under the demonstration program [to demonstrate the cost-effectiveness of advanced insulation in refrigeration units], exempt from mandatory disclosure under section 552 of Title 5, (popularly known as the Freedom of Information Act) **information that the Secretary determines would be a privileged or confidential trade secret or commercial or financial information under subsection (b)(4) of such section** if the information had been obtained from a non-Government party.

*****

†

42 U.S.C. 17244, Pub. L. 110-140, Dec. 19, 2007, 121 Stat. 1704.

§17244. Renewable Energy Innovation Manufacturing Partnership

***

(h) Disclosure

The Secretary [of Energy] may, for a period of up to 5 years after an award is granted under this section, exempt from mandatory disclosure under section 552 of Title 5 (popularly known as the Freedom of Information Act) **information that the Secretary determines would be a privileged or confidential trade secret or commercial or financial information under subsection (b)(4) of such section** if the information had been obtained from a non-Government party.

*****

44 U.S.C. §2204, Pub. L. 95-591, Nov. 4, 1978, 92 Stat. 2525.

§2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information,

in a Presidential record, within one or more of the following categories: ...

(4) trade secrets and **commercial or financial information obtained from a person and privileged or confidential**;

*****

44 U.S.C. §3501 note, Pub. L. 107-347, Dec. 17, 2002, 116 Stat. 2941.

§3501 note. Federal Management and Promotion of Electronic Government Services

(c) Report—

(1) In general—Not later than 3 years after the date of enactment of this Act, the Director [of the Office of Management and Budget] shall oversee a study, in consultation with agencies, the regulated community, public interest organizations, and the public, and submit a report to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives on progress toward integrating Federal information systems across agencies.

***

(e) Protections—The activities authorized under this section shall afford protections for—

(1) **Confidential business information consistent with section 552(b)(4) of Title 5, United States Code**, and other relevant law

*****

47 U.S.C. 1424, Pub. L. 112-96, Feb. 22, 2012, 126 Stat. 210.

§1424. Establishment of the First Responder Network Authority

(e) Meetings

***

(2) Transparency

Meetings of the Board [in charge of the "First Responder Network Authority"], including any committee of the Board, shall be open to the public. The Board may, by majority vote, close any such meeting only for the time necessary to preserve the confidentiality of **commercial or financial information that is privileged or confidential**, to discuss personnel matters, or to discuss legal matters affecting the First Responder Network Authority, including pending or potential litigation.

*****

49 U.S.C. §114, Pub. L. 107-296 Nov. 25, 2002, 116 Stat. 2312.

§114. Transportation Security Administration

***

(r) Nondisclosure of security activities—

(1) In general—Notwithstanding section 552 of Title 5, the Administrator shall prescribe regulations

prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Administrator decides that disclosing the information would—

(B) reveal a trade secret or **privileged or confidential commercial or financial information**; or

*****

49 U.S.C. §309 note, Pub. L. 102-240, Dec. 18, 1991, 105 Stat. 1981.

§309 note. National Magnetic Levitation Prototype Development Program

(A) Proprietary rights.—No trade secrets or **commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of Title 5, United States Code**, which is obtained from a United States business, research, or education entity as a result of activities under this subsection shall be disclosed.

*****

49 U.S.C. §44912, Pub. L. 115-254, Oct. 5, 2018, 132 Stat. 3634.

§44912. Research and development

***

(d) Security and research and development activities

***

(2) Disclosure

(A) In general—Notwithstanding section 552 of Title 5, the Administrator [of the Transportation Security Administration] shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Homeland Security decides disclosing the information would—

(ii) reveal a trade secret **or privileged or confidential commercial or financial information**; or

*****

†

51 U.S.C. §20131, Pub. L. 111-314, Dec. 18, 2010, 124 Stat. 3338.

§20131. Public access to information

(b) Special handling of trade secret or confidential information—

(1) In general—The Administrator [of NASA], for a period of up to 5 years after the development of information described in paragraph (2), may provide appropriate protections against the dissemination of such information, including exemption from subchapter II of chapter 5 of Title 5.

(2) Information described—Information referred to in paragraph (1) is information that results from

activities conducted under an agreement entered into under subsections (e) and (f) of section 20113 of this title [concerning certain contracts and cooperative agreements], and that would be a trade secret or **commercial or financial information that is privileged or confidential under the meaning of section 552(b)(4) of Title 5** if the information had been obtained from a non-Federal party participating in such an agreement.

*****

51 U.S.C. §50916, Pub. L. 103-272, July 5, 1994, 108 Stat. 1340-41.

§50916. Disclosing information

The Secretary of Transportation, an officer or employee of the United States Government, or a person making a contract with the Secretary under section 50907(b) of this title may **disclose information under this chapter that qualifies for an exemption under section 552(b)(4) of Title 5** or is designated as confidential by the person or head of the executive agency providing the information only if the Secretary decides withholding the information is contrary to the public or national interest.

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

INTRODUCTION

Respondent's brief makes one thing clear: Argus Leader does *not* want the Court to proceed. Hence its new justiciability arguments, predicated entirely on the Government's brief. But as the Government acknowledges, FMI's standing is secure and this case is justiciable. U.S. Br. 34-35. Mootness (the doctrine that *does* govern how later events affect justiciability) poses no obstacle either.

The syllogism remains simple. The judgment below mandates disclosure of FMI's members' information; it *causes* that *injury*. Reversal would undo—*redress*—that mandatory disclosure, allowing USDA to withhold the data. And the Government reiterates that it will continue to withhold the information at issue *unless* the Court affirms the judgment below.

Respondent's hunt for any way to avoid merits resolution reflects its inability to defend the *National Parks* substantial-competitive-harm test. Nothing in the brief justifies defining "confidential" differently from its ordinary,

universally understood meaning. And store-level SNAP-redemption data is "confidential," "commercial or financial information"—it entails individual store locations' sales data reflecting market share.

As to "confidential," respondent concedes that *National Parks'* rationale in creating the substantial-competitive-harm test is wrong, offering no defense of that approach. Instead, respondent invokes a purported common-law "term of art" to justify its proposed competitive-harm test: "trade secrets and other confidential commercial information." Resp. 29. This "term of art" is illusory. Any common-law provenance of that "term" went unmentioned in *National Parks*, Exemption 4 cases before and after *National Parks*, scholarly commentary, and FOIA's well-trodden legislative history. It does not even appear in Exemption 4 itself, whose text and structure are markedly different. What respondent has identified instead is an unremarkable concept—that unfair-competition plaintiffs suing their competitors must (like all tort plaintiffs) show harm. This truism sheds no light on the definition of "confidential." FOIA is not an unfair-competition tort statute; to the contrary, it allows *anyone* to obtain information regardless of purpose.

Respondent's ratification argument likewise fails. Congress has never reenacted Exemption 4. That other, later statutes reference or use language like Exemption 4's cannot retroactively change its meaning *when FOIA was adopted*. Moreover, nothing indicates that Congress embraced *National Parks*, much less picked a side in the ensuing Circuit splits. Congress uses Exemption 4's language to ensure consistent agency disclosure obligations throughout federal law, regardless of shifting interpretations.

Respondent ends with its most candid argument—that the consequences of giving Exemption 4 its plain meaning

justify denying Exemption 4 its plain meaning. Congress used FOIA's exemptions to strike a balance between disclosure and protection that courts must observe. And when information is less about what the government does and more about private conduct, the mandatory-disclosure theory is at its nadir.

Finally, respondent all but ignores FMI's second question presented, which the Court need not reach if it restores Exemption 4's plain meaning. But if a competitive-harm requirement survives, the Court would resolve at least five Circuit splits by adopting FMI's proposed standard. That test—drawn from other federal law involving competitive harm—would ask whether competitive harm is reasonably possible, regardless of its source, nature, or immediacy. Respondent offers no reason to repudiate that proposal—indeed, its main argument in the first question turned on unfair-competition law.

ARGUMENT

I. THIS CASE REMAINS JUSTICIABLE

Respondent contends that the Government's brief eliminates FMI's standing "for want of redressability." Resp. 13. Alternatively, again citing redressability, respondent asserts mootness. Resp. 17. Both contentions are meritless. As the Government stated, FMI "had Article III standing to appeal" because its injury "would be redressed if [it] prevailed on appeal." U.S. Br. 34-35. The Government's reaffirmation that it will withhold the data if the Court reverses forecloses a mootness finding. This Court's jurisdiction remains secure.

1. Standing is established at the outset, when "[t]he party invoking the Court's authority" satisfies Article III's familiar requirements: injury, causation, and redressability. *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011). FMI's injury—the mandatory disclosure of its members' information—was actual, imminent, concrete and

particularized.[1] The district court's ruling caused that injury, which reversal would redress by eliminating the only thing requiring USDA to disclose the information.

Respondent also cannot meet its "formidable burden" to show that a case "litigated * * * for years" has become moot. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). To establish mootness, respondent must prove that intervening events make it "impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 670 (2016) (quotation omitted). Here, relief is virtually certain, as reversal will lead to continued nondisclosure. U.S. Br. 30-31, 35.

The Government's long course of conduct further confirms that, absent any order compelling disclosure, USDA would continue to protect the data. USDA litigated against respondent for years. After the district court issued its order, the Government alerted retailers to consider "possible judicial intervention."[2] Once FMI intervened, USDA successfully opposed as moot respondent's motion to compel disclosure. Dist. Ct. Doc. 148 at 2. It moved to amend the existing protective order to give FMI access to sealed portions of the record in prosecuting the appeal. Dist. Ct. Docs. 154, 155. Formal regulations that preclude disclosure, dating from 1978, were then *and still*

---

[1] Respondent describes FMI's intervention as "improper," Resp. 16, but challenged it neither before the Eighth Circuit nor in its BIO; any complaint is thus forfeited and waived. In any event, "preventing the disclosure of commercially-sensitive and confidential information [under Exemption 4] is a well-established interest sufficient to justify intervention under Rule 24(a)." *100Reporters LLC* v. *U.S. Dep't of Justice*, 307 F.R.D. 269, 275 (D.D.C. 2014).

[2] *SNAP Retailer* Data, USDA (Jan. 18, 2017), https://web.archive.org/web/20170121025513/https://www.fns.usda.gov/snap-retailer-data.

are in effect. See U.S. Br. 27-31.[3]

2. Respondent's claim that the case has recently become moot (Resp. 17) rests on a misapprehension. Respondent understands the Government to state that USDA's *only* reason to exercise its discretion to withhold the data under Exemption 4 is that USDA believes that 7 U.S.C. § 2018(c) requires that result. Resp. 13, 17-23. The Government said no such thing. After USDA lost on its § 2018(c) argument, it litigated its Exemption 4 arguments *without* further reference to § 2018(c). See, *e.g.*, Dist. Ct. Doc. 61 at 19-31 & n.8. The Government has made clear in this Court, too, that its Exemption 4 arguments—and its intent to withhold the demanded information—do not turn on whether the Eighth Circuit's prior § 2018(c) ruling was correct. U.S. Br. 30.

The only potential change the Government signaled was *hypothetical*—and would not affect this case *even if* it

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[3] Respondent (at 16 & n.6) cites *Detention Watch Network* v. *Corrections Corp. of America*, No. 16-3141(L), 2017 WL 4122728, at *1 (2d Cir. Feb. 8, 2017)), which suggests that the appellants lacked standing because there was insufficient evidence that the Government endorsed their position and would redress their injury. 2017 WL 4122728 at *1. The Government expressly supports FMI's position. U.S. Br. 34-35. A "reverse FOIA" action under the APA, see U.S. Br. 33-34, would have required identifying adverse agency action, see 5 U.S.C. § 702, but the Government *supported* FMI's position before the district court, too. FMI met each Article III standing requirement and was a proper appellant, with or without the Government. See *Dow Jones & Co., Inc.* v. *U.S. Dep't of Justice*, 161 F.R.D. 247 (S.D.N.Y. 1995) (Sotomayor, J.) (permitting private-party intervenor to proceed without the Government in FOIA litigation after the agency indicated its intent not to appeal); *Didrickson* v. *U.S. Dep't of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) ("Generally, an intervenor may appeal from any order adversely affecting the interests that served as the basis for intervention, provided that the requirements of Article III are satisfied."). In any event, even assuming any flaw in FMI's intervention, respondent's failure to challenge it on appeal cures it.

had transpired. In a footnote, the Government stated that "*if* Congress had not recently amended § 2018(c) [in December 2018], [USDA] *might* have explored changing its position to permit the release of store-level redemption data *collected after* such a change." U.S. Br. 26 n.5 (emphases added). That is, if § 2018(c) had *not* been amended, USDA *might consider prospectively* revising its official nondisclosure policy, but only for data obtained *after* any theoretical regulatory change. Even if all that had happened, it would not affect USDA's position regarding the long-since-collected data at issue here.

Respondent's attempt to use the Government's brief as a justiciability "gotcha" is baseless. As the Government recently told this Court: "Although respondent's merits brief invokes the government's brief to support its position, the government supports petitioner both on the question of Article III jurisdiction in this case and on the application of Exemption 4 to the agency records at issue." Mot. for Leave to Participate 2.

3. Firing one last justiciability arrow, respondent hints that governmental discretion to disclose the data could block redressability. Resp. 16-17. Article III standing to challenge an order that *prevents* an agency from exercising its discretion to provide relief to a petitioner, however, is secure when there is evidence the agency would choose to do so.

In *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 147-148 (2010), for example, petitioners challenged an injunction that prevented an agency from exercising its discretion to partially deregulate petitioners' product. The agency had previously granted this relief to petitioners, and its statements during the litigation indicated it believed doing so was appropriate. There was thus "more than a strong likelihood that [the agency] would partially deregulate [petitioner's product] were it not for the

District Court's injunction." *Id.* at 152; see also, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 170-171 (1997) (recognizing standing to challenge a recommendation that *required* an agency to impose water-use restrictions that the agency had not previously imposed, and concluding that petitioners' injury would "'likely' be redressed" by a favorable ruling). Redress here is far more certain than "likely."

* * *

Respondent and several *amici* make clear their desire that the Court not reach the merits. But no justiciability barrier prevents the Court from resolving the merits questions that it granted certiorari to decide.

II. "CONFIDENTIAL" HAS A WELL-ESTABLISHED PLAIN MEANING THAT DOES NOT REQUIRE SHOWING COMPETITIVE HARM

The Eighth Circuit emphasized that its judgment turned on its conclusion that disclosure was not "likely to cause *substantial* competitive harm." Pet. App. 5a (original emphasis). Respondent never asserts, let alone defends, that substantiality requirement—it even *omits* the word "substantial" when it quotes the actual *National Parks* test, Resp. 24 n.10, and champions a new competitive-harm standard instead.[4]

Indeed, respondent barely mentions *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), at all—despite urging the Court to uphold what lower courts have done "[f]or over 40 years," Resp. 24. Respondent also repudiates *National Parks*' sole rationale—legislative history, which respondent excoriates as "notoriously flawed," "tortured," and "obfuscating." Resp. 51. It instead offers a series of novel tests—each of which is meritless and turns on simply *some* competitive-harm

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[4] The only time the brief links "substantial" with "competitive harm" is in a footnote parenthetical quotation. Resp. 63 n.29.

showing. *Even if* the Court agrees with respondent, therefore the *most* respondent could win is vacatur and remand.[5]

The Court should instead reverse, because none of respondent's attempts to rewrite Exemption 4 remotely overcomes the plain meaning.

A. No common-law "term of art" supports respondent's proposed competitive-harm test

Respondent begins by urging the Court to disregard the statute's plain meaning, arguing that "trade secrets and other confidential commercial information" was "an established common-law term of art" when FOIA was enacted. Resp. 29. Conveniently, that "term" encompassed only information whose disclosure would cause competitive harm. Thus, Congress must have intended a harm requirement in Exemption 4. *Ibid.*

"The canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." *Carter* v. *United States*, 530 U.S. 255, 264 (2000) (original emphasis). For that reason, the canon has no application where "Congress simply describes [a concept] analogous to a common-law [principle] without using common-law terms," *id.* at 265, or adopts text that is merely similar to a preexisting term of art, *e.g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 234-235 (2011). Congress *did not even use* respondent's term—"trade secrets and other confidential commercial information"—in Exemption 4. The actual text is "trade secrets *and* commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4) (emphasis added); see *Bruesewitz*, 562 U.S. at

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[5] And as the Government observes, even if Exemption 4 does not apply, the Court should still vacate and remand for consideration of § 2018(c)'s recent amendment. U.S. Br. 35 n.7.

236 ("linking independent ideas is the job of a coordinating junction like 'and'"). The omission of the supposed "term" alone defeats any claim that Congress intended to adopt that term's alleged meaning.[6]

Respondent's term of art is also a fiction. Respondent identifies no legal dictionary including the phrase "trade secrets and other confidential commercial information," or the shorter "confidential commercial information" variant that respondent sometimes uses—and "surely that's a first hint the phrase wasn't then a term of art bearing some specialized meaning." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539-540 (2019). Respondent (at 30-31) cites §§ 757 and 759 of the contemporaneous Restatement (First) of Torts (1939)—which do not use the phrase. Even a Westlaw search of state and federal cases for "confidential commercial information" before 1966 yields zero results. Cf. *Hall* v. *Hall*, 138 S. Ct. 1118, 1125 (2018) (applying the common-law meaning of a term "with a legal lineage stretching back at least to * * * 1813").

Respondent identifies several cases mentioning trade secrets and business or commercial information in the same sentence. Resp. 31 n.15. But that is *all* that these cases do. None uses respondent's term of art, defines "confidential," or claims that there was a common-law understanding that information is "confidential" only if its disclosure would cause competitive harm.

In contrast, the sources above *do* use the word "confidential"—and do so consistent with its ordinary meaning and without any requirement of competitive harm ("substantial" or otherwise). See FMI Br. 15-22 & n.11

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[6] Exemption 4 also protects the information as "financial" information. *E.g.*, Pet. App. 15a. Respondent never claims that the common law protected *financial* information only if disclosure would cause competitive harm. So even if respondent's stated argument had merit, it could not prevail.

(dictionaries, cases, and other examples establishing that "confidential" means secret and not publicly disseminated); Restatement (First) of Torts § 757 cmts. a, b, h, & j (1939) (using "confidential" and "secret" interchangeably, and the phrases "person to whom the secret was entrusted in confidence," "abuse of confidence," and "breach of confidence"). Congress's use of a word with a well-established *plain* meaning—and its failure to use or define any contrary term of art—resolves this case.

Finally, even aside from the missing "term of art," no evidence suggests that Congress—*sub silentio*—incorporated into Exemption 4 *only* the particular unfair-competition cause of action upon which respondent relies. Respondent claims that when FOIA was enacted, a business could bring an unfair-competition claim against a competitor that had improperly obtained its information and thereby harmed it. Resp. 30-31. Surely true, but Exemption 4 does not purport to codify unfair-competition law (or any other tort). Anyone—not just competitors—may use FOIA to obtain information in the Government's possession.

Had Congress intended to incorporate specialized legal rules into Exemption 4, or add a harm requirement, FOIA would say so. *The very next two exemptions* show as much. See 5 U.S.C. § 552(b)(5) (exempting governmental "memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(6) (exempting "personnel and medical files and similar files" whose disclosure "would constitute a clearly unwarranted invasion of personal privacy"). FOIA's exemptions are interpreted according to their plain text, and thus not necessarily co-extensive with (even *actually* well-established) common law. *NARA* v. *Favish*, 541 U.S. 157, 170 (2004) ("We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the

Constitution.").[7]

Instead, Exemption 4 permits the Government to withhold—without limitation—"commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The fact that *other* statutes or common-law actions might impose additional requirements neither dictates what this statute means nor changes the plain meaning of "confidential." See *United States* v. *Wells*, 519 U.S. 482, 491-493 (1997) (declining to hold the phrase "false-statement" in a statute had a specialized common-law meaning that included the concept of materiality merely because some common-law crimes involving false statements included materiality as an element, and instead interpreting the phrase using its "natural reading"); *Carter*, 530 U.S. at 264-265 (rejecting the assumption that statutory crimes "similar to the common-law crimes of robbery and larceny" implicitly embedded all "the same elements as their common-law predecessors").

Respondent's claim, raised for the first time in this Court, that Exemption 4 incorporates a term of art and mimics a particular common-law cause of action is novel.[8] Nothing in the statute or the common law supports the argument—nor does respondent cite *any* legislator, court,

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[7] Even assuming the narrow-construction doctrine applied, it could only resolve ambiguity—not supplant a word with a well-established plain meaning. FMI Br. 32 n.19; Retail Litigation Center *Amicus* Br. 5-16.

[8] Indeed, asserting that "confidential commercial information" is a unified term of art is inconsistent with respondent's prior litigation position. USDA and respondent "stipulated that the information is commercial or financial" but disputed whether it was "confidential." Pet. App. 15a. The individual words could not be separately analyzed if they were indivisible parts of a term of art. Respondent, like every court to apply Exemption 4, well understood previously that "confidential" could and should be assessed distinctly.

or scholar who, over Exemption 4's fifty-three years, has noted this supposedly well-established common-law heritage.[9] The Court should reject this meritless argument and uphold the plain text.

B. "Confidential" has an unambiguous plain meaning that lacks any harm element

Respondent does not dispute that the plain meaning of "confidential" is "secret and not publicly disclosed." But it fixates on a subset of that definition—information that is "objectively confidential *in nature*" and whose disclosure is "likely harmful." Resp. 43 (original emphasis). Such information, if kept secret, may certainly be "confidential." But respondent lacks even one authority for categorically substituting this subset for the whole.[10]

Simply put, it is unsurprising that information whose disclosure would yield any kind of harm (not just competitive) would be treated confidentially, but that hardly establishes that *only* such information is confidential. Information's *secrecy* is what makes it "confidential," not the *reasons* someone keeps that information secret. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 26-27 (1987) (affirming insider-trading conviction where disclosure of newspaper's confidential information caused no "monetary loss, such as giving the information to a competitor" because "exclusivity is an important aspect of confidential business

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[9] Conversely, courts have considered common law to assess the meaning of "privileged" or scope of "trade secrets" (and the common law of trade secrets was *not* well-established when FOIA was enacted, Pet. 20-21).

[10] The dictionary definitions respondent cites, Resp. 27 n.11, merely confirm that "confidential" and "confidence" are related terms ("of the nature of confidence"), or that confidentiality is associated with "intimacy"—a term that means private (generally in reference to deeply personal information) and requires no showing of harm. *E.g.*, Webster's New International Dictionary 1301 (2d ed. 1960).

information").[11]

Respondent contends that the plain-text interpretation of Exemption 4 makes the standard for "confidential" unduly subjective, making *submitters* the final arbiters of what is confidential. *E.g.*, Resp. 44-45. To the contrary, parties claiming the exemption must prove, for example, a custom of keeping the information at issue secret and that the information was in fact considered and kept secret—an objective and verifiable standard. See *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) *(en banc)* (describing "would customarily not be released to the public" as an "objective" test).[12]

Respondent's attempt to turn *Department of Justice* v. *Landano* to its advantage likewise fails. Resp. 43-44. *Landano* supports petitioner: it held that "confidential" warranted its plain meaning in FOIA Exemption 7, which protects records that could reasonably be expected to

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[11] Some *amici* implore the Court to forego consideration of this case (or embrace the competitive-harm test) because Congress amended FOIA in 2016 to specify that in future cases agencies "shall withhold information • • • only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption • • •; or (II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). That language says nothing about what Exemption 4 means by "confidential," and releasing "confidential" information (as this Court defines it in this case) to someone else *is itself* the interest that would be harmed. Only if respondent's atextual interpretation of the statute prevails will that interest be limited to "competitive harm."

[12] Respondent likewise attacks the Government's application of the plain-text interpretation as giving "even a low-ranking" federal employee unchecked power to bestow confidentiality, when FOIA precludes withholding by fiat. Resp. 60. Exemption 4's "obtained from a person" requirement ensures that only *non-governmental* information (already at the outer fringe of FOIA's goal of governmental transparency) can benefit from Exemption 4 at all. The rogue-bureaucrat worry is baseless, too—the assurances here came from longstanding, officially-promulgated regulations. U.S. Br. 27-31.

disclose the identity of a confidential law-enforcement source. 508 U.S. 165, 174 (1993). The Court then separately addressed a second issue: when a source can reasonably *infer* that the Government has promised to keep the communication confidential. *Id.* at 172 (identifying the two issues); *id.* at 179-180 (analyzing the second issue). Respondent's claim that *Landano* recognized that "confidential" is only an "objective" term of the sort respondent demands here mistakenly focuses on the analysis of this second issue. Resp. 43-44 (citing 508 U.S. at 179). This Court has never injected a harm requirement into the ordinary word "confidential," in *Landano* or elsewhere. See FMI Br. 19 n.11 (gathering cases); *Carpenter*, 484 U.S. at 26-27.

To bolster its odd interpretation of "confidential," respondent cites statutes—but those prove that when Congress intends for legislation to apply only to confidential information that is *also* "damag[ing]" or "sensitive," it specifically includes such an element in the statute. See Resp. 48 (excerpting statutes). Respondent's examples from "common parlance" and judicial opinions likewise fail. It is unremarkable that one would assume, unless told otherwise, that another person's bank PIN is kept private, or would emphasize the secrecy of particularly important information by referring to that information as "*highly* confidential." See Resp. 45-48 (emphasis added).

Lastly, respondent turns to inapposite civil-discovery and judicial-sealing standards. When Congress intends to import discovery's specialized rules into FOIA, it does so explicitly: Exemption 5 exempts documents "that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5).[13] To

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[13] Even Exemption 5, moreover, does not to incorporate all discovery rules and privileges. See *FOMC* v. *Merrill*, 443 U.S. 340, 354 (1979).

protect confidential information under Federal Rules of Civil Procedure 26 and 45 (both of which post-date FOIA), a party must show harm as an *additional* requirement, not as part of establishing confidentiality. Rule 26(c)(1) requires a party seeking a protective order for any type of information to prove "good cause." The 1991 Advisory Notes to Rule 45(d)(3)(B) specify that a district court may quash a subpoena requiring the disclosure of "confidential * * * commercial information" if compliance would be "unnecessary or unduly harmful."[14] Thus, in applying the "qualified [evidentiary] privilege for confidential commercial information" in *FOMC* v. *Merrill*—an Exemption 5 case—this Court first analyzed whether the information was "confidential" and "commercial," 443 U.S. 340, 361 (1979), and then *separately* analyzed whether the harm from disclosure justified applying the evidentiary privilege, *id.* at 363.

Judicial-sealing standards stem from the presumption that court documents should be publicly available. *Nixon* v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 597-598 (1978). There is no common-law or constitutional right to information provided by "FOIA laws," which "are of relatively recent vintage." *McBurney* v. *Young*, 569 U.S. 221, 234 (2013). Bankruptcy Code § 107 governing sealing "confidential commercial information" in bankruptcy records has been interpreted to include *both* a confidentiality and a harm requirement, *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994), but it was enacted ten years after FOIA and has no relevance to Exemption 4's use of "confidential." See 11 U.S.C. § 107.

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[14] Respondent also references Federal Rule of Criminal Procedure 17(c)(3), which is "substantially the same" as Civil Rule 45. Fed. R. Crim. P. 17 Advisory Committee's Note to 1944 Amendments.

* * *

Respondent clearly finds the textual standard to be insufficiently stingy, but none of its arguments gives it warrant to redefine "confidential" to mean something other than information that is secret and not publicly disclosed.

C. Congress has not ratified *National Parks*

Respondent also contends that the Court need not even assess what "confidential" means—it should preserve *National Parks* because Congress allegedly ratified that decision by subsequently enacting statutes that reference or use language like Exemption 4's. But ratification presumes that Congress was aware of a well-settled judicial interpretation of a statute, and then adopted that interpretation by *reenacting* that statute using the same or substantially similar language. *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019). Congress has never reenacted Exemption 4 since its original passage in 1966. Exemption 4 must thus be interpreted according to what it meant when enacted in 1966—not what subsequent Congresses may have intended when passing other, later statutes.[15] See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) (ratification may occur where "Congress adopts a new law incorporating sections of a prior law * * * insofar as it affects the new statute").

Respondent's argument also neglects the timeline over which the law has developed. The D.C. Circuit decided *National Parks* in 1974, breaking with prior judicial interpretations of the statute. FMI Br. 21. Over the years, other Circuits followed. Pet. 14 n.10 (gathering cases).

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[15] Respondent previously relied on a 1978 House Committee Report to make this ratification or acquiescence argument—now replaced with the underlying hearings and relegated to a footnote. BIO 15-16; Resp. 40 n.19. As FMI previously noted, that Report declined to take a position on *National Parks*' merits and regardless is irrelevant to interpreting a statute that a prior Congress enacted. Cert. Reply 4.

Even if ratification *were* a valid theory here, respondent does not identify when *National Parks* became such an unquestioned, well-settled judicial interpretation that Congress could be presumed to have adopted it. That surely could not have occurred by 1975, when respondent's list of statutes begins. See *Jama* v. *ICE*, 543 U.S. 335, 349 (2005) (congressional ratification applies only if Congress reenacted the same statute without change, and "the supposed judicial consensus [is] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it").

Respondent also does not identify *which* version of *National Parks* Congress supposedly endorsed. That test has spawned numerous Circuit splits. Pet. 25-29. The D.C. Circuit substantially altered it in 1992 to define "confidential" differently based on whether the requested information was voluntarily submitted to the government. *Critical Mass*, 975 F.2d at 876-877; see Pet. 28-29. When Congress enacted the 37 statutes included in respondent's appendix that post-date *Critical Mass*, did it follow the D.C. Circuit or others? When there is no indication of which potential judicial interpretation Congress presumably adopted, the presumption is that it stayed out of the matter. *E.g.*, *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 525 (1984).

Respondent's list of statutes—enacted when Circuits were gradually and inconsistently interpreting Exemption 4—illustrate that it is impossible, indeed illogical, to presume that Congress ratified any particular judicial interpretation of Exemption 4. Instead, it is far more likely that Congress consistently referenced Exemption 4 or used the same basic phrasing in other statutes to ensure that agencies' disclosure obligations remain consistent, regardless of shifting judicial interpretations.

Finally, respondent contends (Resp. 39-40 & n.19) that

ratification applies because Congress regularly reviews FOIA (citing reports on Exemption 4 from 1977 and 1984) and has amended *other* FOIA provisions. Legislative-acquiescence arguments are at "best only an auxiliary tool" that cannot overcome the plain meaning of Congress's words. *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534 (1947).

Moreover, FOIA's amendments have been limited to modifying particular exemptions or clarifying procedural aspects of the law. This Court has declined to ascribe significance to Congress's inaction where "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments," since "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted). Congress could choose to revise Exemption 4—but it has not. It remains this Court's duty to interpret the statute's language.

D. Giving "confidential" its plain meaning advances FOIA's purpose

Respondent opposes giving "confidential" its ordinary meaning because doing so would "threaten[] serious damage to FOIA's core objective of shedding light on 'what the government is up to,'" particularly regarding government spending. Resp. 53 (quoting *Favish*, 541 U.S. at 171-173). But policy arguments cannot rewrite plain statutory text. See *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018).

FOIA favors government transparency but does not mandate disclosure at any cost. Congress balanced these interests by limiting Exemption 4 to information "obtained from a person"—*i.e.*, *not* government information.[16]

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[16] Respondent properly abandoned its certiorari-stage assertion that

Accordingly, most examples respondent offers would not change under a plain-text interpretation. For example, information on bank-bailout funds, Resp. 54-55, was ordered disclosed because it reported "actions that were taken by the government." *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 149 (2d Cir. 2010). Likewise, the CFPB request, Resp. 56, was for "[a]ll records by or between CFPB employees" regarding the issue—not information obtained from a person. *Cause of Action Inst.* v. *CFPB*, No. 16-2434 (D.D.C. Dec. 13, 2016), Dkt. 1, ¶ 14.

But even if Exemption 4's plain reading gives the government discretion to withhold some private information, that is simply the balance Congress struck. If certain categories of such information are so critical that they warrant disclosure despite Exemption 4, that policy judgment is surely for Congress alone. Until Congress acts, however, its unambiguous statutory language governs. See *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[T]he parties and their *amici* manage to present many and colorable arguments both ways on them all, a fact that suggests to us for certain but one thing: that these are matters for Congress, not this Court, to resolve.").

Even government spending—unquestionably linked to a tradition of disclosure—does not justify *categorical* disclosure under the statute. Nor do all figures related to government spending actually reflect government action. See, *e.g.*, *McDonnell Douglas Corp.* v. *U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (describing

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SNAP data is not "obtained from a person"—an already-forfeited and plainly wrong contention. See Cert. Reply 9-11. While the SNAP data was obtained from EBT processors, not directly from retailers, Resp. 64-65, EBT processors are contractually required to maintain SNAP-data confidentiality. See FMI Br. 4.

line-item prices in a government contract, unlike competing bottom-line bids, as "a matter of indifference to the purpose of the FOIA"). Retailers' store-level SNAP data is one such example. The federal government's role in SNAP is to fund benefits for low-income beneficiaries and approve retailers to participate in the SNAP program. 7 U.S.C. § 2013(a). The government already releases SNAP-funding information[17] and identifies SNAP-approved retailers.[18]

The amount of SNAP redemptions at a *particular* store, in contrast, is not the result of any government action; it depends on and reflects SNAP beneficiaries' choices to patronize that location. Releasing such information thus would not inform the public what the *government* is doing.[19]

Giving "confidential" its ordinary meaning also supports FOIA's stated goal of prompt resolution. 5 U.S.C. § 552(a)(6). The *National Parks* standard often results in cases oscillating repeatedly between the district and circuit courts. *E.g.*, *Washington Post Co.* v. *U.S. Dep't of*

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[17] FMI Br. 5 n.4 (citing SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited March 29, 2019)).

[18] Where Can I Use SNAP EBT? https://www.fns.usda.gov/snap/retailerlocator (last visited March 29, 2019).

[19] The Government mistakenly states that because the SNAP data "corresponds to the government's own payments of federal funds," it reflects governmental action. U.S. Br. 25-26. The Government's prior representation to the district court was correct—that the data "does not speak towards Government spending *at all*." Reporter's Record II:448 (emphasis added). Any payment from the Government is indifferent to the location. There is no payment from the Government to retailers, only *reimbursement*, through the EBT processors, for the selections made by SNAP beneficiaries. See, *e.g.*, JA 79, 81-82; Reporter's Record I:37-39. Store-level SNAP-redemption data memorializes actions *SNAP beneficiaries* take.

Health & Human Servs., 865 F.2d 320, 328 (D.C. Cir. 1989) (remanding to resolve a factual question after reversing the trial court's prior three orders). Moreover, as respondent agrees, commercial interests dominate FOIA. Resp. 58. The sheer volume of such requests dramatically decreases agencies' ability to timely respond, causing delays that likely have deterred journalists from using FOIA for its *intended* purposes. Kwoka, *FOIA, Inc.*, 65 Duke L. Rev. 1361, 1422-1424 (2016). Especially pernicious are those requesters that resell FOIA records, transforming FOIA into "a mechanism for transferring wealth from the federal government to private enterprise," an "unjustified form of corporate subsidy never contemplated, much less endorsed, by Congress." *Id.* at 1415. Respondent's characterization of commercial requests as a "feature, not a bug" contradicts its exultation of FOIA as key to the public's right-to-know, because the former strangles the latter.

Finally, as a pragmatic matter, the plain text would reduce the administrative burden on the government and courts. Exemption 4 accounts for only 1.39% of total exemption usage.[20] Nonetheless, though comparatively few FOIA requests result in litigation, "[t]he issues most commonly tried in FOIA cases arose under exemption 4." Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 269 (2011). The current test has also spawned five Circuit splits that would be resolved by restoring Exemption 4 to its plain text. See Pet. 24-29.

III. If Any Competitive-Harm Test Survives, Respondent Presents No Meaningful Objections To FMI's Proposed Reformation

FMI proposed that if the Court chooses to depart from

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[20] Summary of Annual FOIA Reports for Fiscal Year 2017, at 8, https://www.justice.gov/oip/page/file/1069396/download.

Exemption 4's plain language in the vein of *National Parks*, it should strip away decades of accumulated gloss and return the test to its roots: an inquiry into "the possibility that disclosure will harm legitimate private or governmental interests in secrecy." *National Parks*, 498 F.2d at 770. Respondent refuses to join issue with most of petitioner's arguments, insisting that there is "no basis to water down the longstanding competitive-harm standard." Resp. 61 (capitalization revised). Instead, respondent repeats its deficient "common law" and ratification arguments.

Respondent's use of the "common law" to defend against reformulating the competitive-harm test is ironic. If, as respondent suggests, unfair-competition law inspired Congress in crafting Exemption 4, then Exemption 4 should be read in harmony with the federal unfair-competition statute. See FMI Br. 48 (proposing Robinson-Patman Act standards to ascertain competitive harm). Respondent has no rebuttal.

Respondent next suggests that the well-recognized lower-court chaos can be ignored as the expected result of a test that incorporates the adverb "likely." Resp. 63. But the conflict below involves more than gradations of "likelihood." Respondent's brief ignores the certiorari-stage dissenting opinion in *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383, 383-385 (2015), which catalogues how lower courts disagree about even the *factors* to consider in assessing "competitive harm." See also FMI Br. 49-50.

Respondent's own *amici* confirm this confusion. Seven advocate for a competitive-harm test—yet offer four different versions of it. Respondent cannot maintain that *National Parks* requires no elucidation given the internecine battle over its meaning.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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In the Supreme Court of the United States

FOOD MARKETING INSTITUTE, PETITIONER

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), exempts from mandatory disclosure under FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Ibid.* The question presented is:

Whether an individual retail store's aggregate annual dollar amount of Supplemental Nutrition Assistance Program benefits that the store redeems under the Program qualifies as "confidential" commercial or financial information under FOIA Exemption 4.

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INTEREST OF THE UNITED STATES

The United States Department of Agriculture (USDA) determined that the records at issue in this case were exempt from the Freedom of Information Act (FOIA), 5 U.S.C. 552, and defended its decision in district court. More broadly, the United States has a substantial interest in FOIA's proper interpretation.

STATEMENT

1. Congress enacted FOIA, 5 U.S.C. 552, in 1966 as an amendment to Section 3 of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* See FOIA, Pub. L. No. 89-487, 80 Stat. 250; *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989). Under FOIA, a federal agency must generally make agency records available to "any person" who has submitted a "request for [such] records." 5 U.S.C. 552(a)(3)(A).

"[FOIA] does not apply," however, to any matters identified in its exemptions. 5 U.S.C. 552(b). As relevant here, Exemption 4—the text of which Congress enacted in 1966 and has never amended—exempts matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4); see 80 Stat. 251. This case concerns whether certain USDA records relevant to the Supplemental Nutrition Assistance Program (SNAP) qualify under Exemption 4 as "confidential" commercial or financial information.

2. a. USDA's Food and Nutrition Service (FNS) administers SNAP (formerly the food-stamp program), 7 C.F.R. 271.3(a), under the Food Stamp Act of 1977, Pub. L. No. 95-113, Tit. XIII, 91 Stat. 958 (7 U.S.C. 2011 *et seq.*), now renamed the Food and Nutrition Act of 2008.[1] SNAP "permit[s] low-income households to obtain a more nutritious diet through normal channels of trade by increasing [their] food purchasing power." 7 U.S.C. 2011. Today, a state agency, after determining a household's SNAP eligibility, will issue to that household an electronic benefit transfer (EBT) card, akin to a debit card, to access the household's SNAP benefit allotment. 7 U.S.C. 2016(a), (b), and (h)(1), 2020(a)(1). The household may use its allotment "only to purchase food from retail food stores which have been approved for participation in [SNAP]." 7 U.S.C. 2013(a) (2012).

If a retail food store applies to participate in SNAP and USDA finds it qualified, USDA approves the store's participation for a five-year period. 7 U.S.C. 2018(a)(3); 7 C.F.R. 278.1(j). USDA, however, can also "periodic[ally] reauthoriz[e]" the store to participate, 7 U.S.C.

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[1] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Tit. IV, Subtit. A, § 4001(a), 122 Stat. 1853.

2018(a)(2)(A), even before the five-year period expires, by evaluating updated information, 7 C.F.R. 278.1(j) and (n), and can withdraw authorization, 7 C.F.R. 278.1(*l*).

b. The food-stamp program originally utilized physical food-stamp coupons, which constituted an "obligation of the United States" for payment. 7 C.F.R. 271.5(a) (1979). An approved retail food store would collect such coupons from beneficiaries as payment, 7 C.F.R. 278.2(a) (1979), and redeem them "to banks for credit or for cash." 7 C.F.R. 278.4(c) (1979). Receiving banks then would cancel the coupons (like checks) and transmit them to a Federal Reserve Bank for payment by the government. 7 C.F.R. 278.5(a) and (b) (1979).

In addition, USDA required each store to complete a redemption certificate "show[ing] the value of the coupons redeemed" and to submit the completed form with the coupons to the redeeming bank, which was required to "forward[]" such certificates to FNS "at least once a week." 7 C.F.R. 278.4(c), 278.5(a) (1979). That certificate process, which operated in tandem with the payment process, enabled USDA to collect redemption information from retailers through intermediary banks.

The program's use of physical coupons ended in 2009, 7 U.S.C. 2016(f)(3), but USDA's parallel payment and redemption-information-collection processes continue under today's EBT system. When a SNAP beneficiary uses an EBT card at a retailer's point-of-sale device and enters a personal-identification-number (PIN) code to access his benefits, the device communicates with an "EBT processor," *i.e.*, a private company with which the relevant State has contracted to process SNAP transactions. J.A. 76-79. The EBT processor approves the transaction if it verifies the PIN, the sufficiency of the beneficiary's SNAP balance to cover the

transaction, and the store's SNAP authorization. J.A. 77; Pet. App. 40a n.4.

The EBT processor then initiates two distinct processes. See J.A. 108-109 (redemption flow chart). First, the EBT processor transmits a daily Automated Clearing House file to its bank to arrange payment to each retailer's designated bank account. J.A. 80-81, 108. If a retailer operates multiple approved retail-food-store locations, a single aggregate daily payment is made to the retailer's designated account. J.A. 81; Trial Tr. (Tr.) 36-39. The EBT processor then seeks reimbursement for those payments from the government. J.A. 81, 83.

Second, the EBT processor forwards the aggregate daily SNAP-redemption data from each retail food store to FNS, which FNS uploads into its Store Tracking And Redemption System (STARS). J.A. 74-75, 79; see 7 C.F.R. 274.8(a)(3)(viii) (requiring that "daily redemption activity" data be forwarded to FNS "at least once weekly").[2] FNS obtains "store-level SNAP redemption data" from no other source. J.A. 80. This case concerns a FOIA request for that redemption data from STARS. J.A. 41.

c. Congress authorized USDA to issue regulations providing for "the redemption of benefits accepted by retail food stores," 7 U.S.C. 2019 (2012), but that authorization does not specifically address USDA's collection of redemption data from stores. Instead, under Section 2018(c), USDA regulations "shall require an applicant retail food store * * * to submit information" that will permit a determination about whether "such

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[2] The EBT processor additionally forwards to FNS detailed data on each individual SNAP transaction, which FNS uploads into its Anti-fraud Locator using EBT Retailer Transactions (ALERT) system. J.A. 74, 79-80. That data is not at issue here.

applicant qualifies, or continues to qualify, for approval" under the Act. 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977). Those regulations "shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by [Section 2018(c)] to purposes" specified therein. 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977).

USDA's initial implementing regulations provided that the contents of applications and other information furnished by firms—including "their redemptions of coupons"—could "not be used or disclosed," except in circumstances not relevant here. 7 C.F.R. 278.1(*l*) (1979); accord 7 C.F.R. 278.1(q) (1996); cf. Tr. 125. In 1994, Congress amended Section 2018(c) to grant USDA authority to disclose covered information to law-enforcement and investigative agencies, and to add a criminal prohibition against disclosing "any information obtained under [Section 2018(c)]" "in any manner or to any extent not authorized by Federal law (including a regulation)." 7 U.S.C. 2018(c) (1994). USDA then revised its regulation to specify that "information required to be submitted by retail food stores" under Section 2018(c) "to determine continued eligibility"—including "redemption data"—"may be disclosed" in certain circumstances, 7 C.F.R. 278.1(r) (1997), and that USDA "shall determine [based on listed criteria] what information can be disclosed," 7 C.F.R. 278.1(r)(1) (1997). That regulation governing when "redemption data" "may be disclosed" remains materially unchanged today. 7 C.F.R. 278.1(q) and (1).

3. In February 2011, respondent, a media organization, submitted a FOIA request for "data from the FNS STARS database" for FY2005-FY2010, including, as relevant here, "[t]he yearly redemption amounts, or

EBT sales figures, for each store." J.A. 41. USDA publicly reports annual SNAP-redemption data on a national, regional, state, and store-type basis, and has also disclosed county- and ZIP-code-level redemption data.[3] But it has not publicly disclosed redemption data for individual stores. USDA accordingly denied respondent's FOIA request for the store-level redemption information from roughly 321,000 participating stores. Pet. App. 27a; J.A. 87. Respondent then filed this FOIA action. Pet. App. 27a.

a. The district court initially granted summary judgment to USDA based on FOIA Exemption 3 and Section 2018(c). Pet. App. 24a-45a.

Exemption 3 applies to matters "specifically exempted from disclosure by statute" "if that statute" satisfies certain criteria. 5 U.S.C. 552(b)(3). Respondent did not "deny that § 2018 qualifies as a withholding statute" under Exemption 3. Pet. App. 38a; see *id.* at 53a. Respondent instead argued that the requested "redemption data is not the type of information" Section 2018(c) protects. *Id.* at 38a. The district court held that USDA collects SNAP-redemption data under Section 2018(c) "to determine if a retailer *continues* to qualify for SNAP participation" and that such "redemption data is

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[3] See, *e.g.*, USDA, *Fiscal Year 2017 At A Glance* 2-4 (2018), https://www.fns.usda.gov/sites/default/files/snap/2017-SNAP-Retailer-Management-Year-End-Summary.pdf; see also USDA, *SNAP Retailer Data*, https://www.fns.usda.gov/snap-retailer-data (last updated Sept. 19, 2018); USDA, *Data Access and Documentation Downloads*, https://www.ers.usda.gov/data-products/food-environment-atlas/data-access-and-documentation-downloads/ (last updated Mar. 27, 2018). USDA has disclosed redemption data on a county- and ZIP-code basis where the data would not disclose the SNAP redemption of individual retailers. Def. Statement of Material Facts ¶¶ 287-288 (Jan. 20, 2015).

the type of information reached by [Section 2018(c)'s] plain language." *Id.* at 41a; see *id.* at 39a, 42a.

b. The Eighth Circuit reversed and remanded. Pet. App. 48a-57a. The court agreed with respondent that Section 2018(c) does not protect SNAP-redemption data. *Id.* at 53a-54a. It reasoned that Section 2018(c) authorizes USDA to require retail food stores to "submit[]" information and protects from disclosure information "obtained" under that authority, but that "the underlying [redemption] data [here] is 'obtained' from third-party [EBT] processors, not from individual retailers." *Id.* at 54a; see *id.* at 55a.

c. After the remand, USDA stated that, in light of its "long-standing policy" that protected "[store-level redemption] data as confidential" under regulations implementing Section 2018(c)—and its recognition that retailers that participated in SNAP from 2005-2010 "did so under the expectation that such data would be protected"—store-level "data w[ould] not be released." J.A. 71-72. The district court nonetheless denied USDA summary judgment under Exemption 4. Pet. App. 60a-70a. The court explained that the Eighth Circuit had adopted the D.C. Circuit's "*National Parks* test," under which information is deemed "confidential" under Exemption 4 if its disclosure is likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 66a-67a (quoting decision quoting *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*)). USDA relied on the second prong of that test. The district court concluded, however, that a genuine issue of material fact existed over whether "disclosure

of an individual store's yearly redemption data is likely 'to cause substantial harm to [its] competitive position.'" *Id.* at 67a-68a.

The district court held a two-day bench trial on that question. See Tr. 1-455.[4] Several USDA "employees testified about the collection of SNAP data," and industry witnesses and academics "testified about the potential harm in disclosing the requested data." Pet. App. 11a; see *id.* at 11a-13a (describing testimony).

On November 30, 2016, the district court entered judgment for respondent. Pet. App. 22a-23a. In its opinion (*id.* at 9a-21a), the court concluded that store-level annual SNAP-redemption information was not "confidential" under the prong of the *National Parks* test invoked by USDA, because disclosure was not "likely" to "cause substantial competitive harm" to retailers. *Id.* at 16a-17a, 20a (citation omitted). Although the court found that "[c]ompetition in the grocery business is fierce" with thin "profit margins," *id.* at 17a-18a, it declined to rely on testimony of food-industry witnesses and determined that "any potential competitive harm" was "speculative at best," *id.* at 18a-19a.

4. a. In a memorandum dated January 18, 2017, USDA memorialized its "decision to comply with the [district] court ruling," rather than appeal. Resp. Mot. to Compel, Ex. 1 (Jan. 23, 2017).

Petitioner—an organization with food-retailer members, Pet. ii—then moved to intervene, stay the judgment, and extend the time to appeal. See Pet App. 72a-73a. The district court granted that motion. *Id.* at 71a-78a. USDA promptly informed the district court that,

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[4] The parties "stipulated that the information is commercial or financial" under Exemption 4. Pet. App. 15a.

"given the stay" of its judgment, USDA would "maintain" (not release) "the documents until the Eighth Circuit rule[d]." USDA Resp. to Mot. to Compel 2 (Feb. 3, 2017). Petitioner subsequently appealed.

b. The Eighth Circuit affirmed. Pet. App. 1a-6a. The court explained that the dispositive issue was whether "the contested data were 'confidential,'" because respondent agreed that the data were "commercial or financial" and did not contest that they were "obtained from a person" under Exemption 4. *Id.* at 2a & n.2. The court then applied the *National Parks* test, *id.* at 3a, and rejected petitioner's challenge to it, including petitioner's contention that the term "confidential" should reflect its "dictionary definition[]." *Id.* at 4a n.4.

The court of appeals determined that the district court did not "clear[ly] err[]" in finding that store-level redemption information was not confidential under *National Parks*. Pet. App. 4a-5a. Although the court noted a "likelihood of [the data's] commercial usefulness" to competitors "in a competitive marketplace," it determined that the trial evidence was insufficient to overturn the trial court's finding that disclosure was "[un]likely to cause *substantial* competitive harm." *Id.* at 5a.

c. After the court of appeals denied rehearing and declined to stay its mandate, Pet. App. 79a-80a, 85a-86a, this Court recalled and stayed the mandate pending its resolution of this case. *Id.* at 82a.

On December 20, 2018, Congress enacted the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490. Section 4006(f)(3) of that Act amends Section 2018(c) to cover and protect SNAP "redemption data provided through the electronic benefit transfer system." See App., *infra*, 3a. Section 2018(c) thus now expressly applies to the data at issue in this case.

SUMMARY OF ARGUMENT

FOIA "does not apply" to matters identified in its Exemptions, 5 U.S.C. 552(b), including, under Exemption 4, "confidential" "commercial or financial information obtained from a person." 5 U.S.C. 552(b)(4). That text covers the store-level SNAP-redemption information here, which is "confidential" because it was communicated in confidence to USDA between FY2005 and FY2010 in light of the government's longstanding and repeated representations that it would not publicly disclose redemption data. The court of appeals' contrary holding rests on a flawed interpretation of "confidential."

A. 1. The ordinary meaning of "confidential" is "[c]ommunicated in confidence" or "secret." See, *e.g.*, *Webster's New International Dictionary* 560 (2d ed. 1957). That meaning encompasses two categories of information under Exemption 4. First, information may be confidential based on its treatment outside of the government, *i.e.*, where it "would customarily not be released to the public by the person from whom it was obtained." *Forsham* v. *Harris*, 445 U.S. 169, 184-185 (1980) (quoting committee report). Second, information may be confidential based on the circumstances under which an agency receives it, *i.e.*, where it was "given to an agency in confidence," because the agency "obligated itself in good faith not to disclose [such] documents or information." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

That understanding is reinforced by statutory context. FOIA's "core purpose" is to require disclosure when it will "contribut[e] significantly to public understanding *of the operations or activities of the government.*" *United States Dep't of Justice* v. *Reporters*

Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989). Just as the "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind," *id.* at 765, Congress did not design FOIA generally to require disclosing commercial or financial information of nongovernment entities. Exemption 4 protects such confidential information from mandatory disclosure, including to marketplace competitors.

2. The Eighth Circuit applied the *National Parks* test, which limits "confidential" information to contexts in which disclosure would likely "cause substantial harm to the [submitter's] competitive position" or "impair the Government's ability to obtain necessary information in the future." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). That test has no basis in FOIA's text or context. Even respondent fails to offer any textual basis for it. The D.C. Circuit has since artificially limited *National Parks* to a subset of Exemption 4 contexts and elsewhere applies the ordinary meaning of "confidential," thus confirming the test's inherent flaws.

3. Respondent's other contentions do not salvage *National Parks*. A "narrow construction" of Exemption 4 cannot yield *National Parks*' atextual test; post-enactment statements during a different Congress do not support it; and respondent's remaining sources fail to provide any sound basis for departing from the text Congress enacted.

B. The store-level SNAP-redemption information here is "confidential." It is "confidential" under Exemption 4 because it was reasonably "communicated in confidence" to USDA. Stores submitted that redemp-

tion information in the context of USDA's repeated representations going back more than 40 years that it would *not* publicly disclose it.

C. Finally, in the circumstances of this case, petitioner had Article III standing to bring an independent appeal after the government declined to appeal itself. USDA had previously given independent assurances that it would not disclose store-level redemption data, and then, significantly, it provided an additional assurance that it would not disclose the relevant information during appellate proceedings. The government has now further determined that, *if* the district court's judgment mandating disclosure is reversed, it will not disclose that data in light of its legal obligations under Section 2018(c). A favorable appellate decision thus would likely redress petitioner's injury-in-fact. Accordingly, the Eighth Circuit's judgment should be reversed.

ARGUMENT

STORE-LEVEL SNAP-REDEMPTION INFORMATION IS "CONFIDENTIAL" UNDER FOIA EXEMPTION 4

FOIA Exemption 4 applies to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). As the case comes to this Court, it is established that store-level redemption information —*i.e.*, the dollar amount that each individual retail food store redeems through SNAP—is "commercial or financial information" that was "obtained from a person" by USDA. Pet. App. 2a & n.2. That information is also "confidential" under Exemption 4 because it was communicated in confidence to USDA. The court of appeals erred in holding otherwise.

A. The Term "Confidential" In Exemption 4 Carries Its Ordinary Meaning

FOIA does not define the term "confidential." In the absence of a statutory definition, "[i]t is a 'fundamental canon of statutory construction'" that "'words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). Dictionaries contemporary to the 1966 enactment of Exemption 4 establish that information that an agency has obtained from a person will be "confidential" if the information (1) would customarily not be released to the public by the person from whom it was obtained, or (2) was communicated in confidence to the government. That plain-language interpretation of "confidential" is confirmed by FOIA's statutory context and legislative history.

1. Exemption 4's text, context, and history show that "confidential" carries its ordinary meaning

a. The contemporary and ordinary meaning of "confidential" was—and still is—"[c]ommunicated in confidence" or "secret." *Webster's New International Dictionary* 560 (2d ed. 1957); see *Webster's Third New International Dictionary* 476 (1966) ("communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : PRIVATE, SECRET"); see also *American Heritage Dictionary* 279 (1970) ("Done or communicated in confidence; told in secret."); *Black's Law Dictionary* 370 (4th ed. 1951) ("intended to be held in confidence or kept secret"). Indeed, this Court in *United States Department of Justice* v. *Landano*, 508 U.S. 165 (1983), which construed "confidential" in FOIA Exemption 7(D), quoted the 1986 edition of *Webster's Third* defining that

word to mean "'communicated, conveyed, [or] acted on . . . in confidence: known only to a limited few: not publicly disseminated.'" *Id.* at 173 (citation omitted; brackets in original). Under that common understanding of the term, Exemption 4 protects two general categories of "confidential" information.

First, information may be "confidential" based on circumstances independent of the context in which the government receives it. Such information is "confidential" if it is generally held in confidence or kept secret by those who convey it to the government. The submission of such "confidential" information to the government does not automatically strip it of its confidential status because, "[i]n common usage, confidentiality is not limited to complete anonymity or secrecy." *Landano*, 508 U.S. at 173. So long as the context in which the information is provided does not indicate that the government would itself publicly disseminate it, the information remains confidential under Exemption 4.

That ordinary understanding of the term is reflected in the committee reports on FOIA as enacted in 1966. The reports emphasize that Exemption 4 protects "the confidentiality of information obtained by the Government" when it "would not customarily be made public by the person from whom it was obtained." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (*House Report*); accord S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (*Senate Report*). This Court has accordingly observed, citing those reports, that Exemption 4 "was designed to protect confidential information" where it "'would customarily not be released to the public by the person from whom it was obtained.'" *Forsham* v. *Harris*, 445 U.S. 169, 184-185 (1980) (citations omitted). Such information,

for instance, would typically "include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments." *House Report* 10; see *Senate Report* 9 (similar list including "business sales statistics"). Determining such information's confidentiality based on objective factors reflecting how the information is customarily treated outside of the government provides a straightforward and workable basis on which to apply Exemption 4's protections.

Second, information may be "confidential" because of the circumstances of its receipt by the government. If a person provides information to the government in the context of government statements or actions that are reasonably understood to show that the government will not publicly disclose it, such information is "communicated in confidence" and is therefore "confidential." Exemption 4's protective scope therefore "include[s] information which is *given to an agency in confidence*," and embodies the fairness-based principle that "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." *House Report* 10 (emphasis added).

b. The foregoing meaning of "confidential" is reinforced by FOIA's broader statutory context, including within Exemption 4 itself and in the analogous provisions of Exemption 7(D).

i. Exemption 4's protection for "confidential" information applies only if the information is commercial or financial information "obtained from a person," 5 U.S.C. 552(b)(4), *i.e.*, commercial or financial information that is "obtained [from] *outside* the Government." *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 360 (1979) (emphasis added); see 5 U.S.C.

551(2) (defining "'person'" to include an individual or entity "other than an agency"). That limitation is significant, because FOIA's "core purpose" is simply to require disclosure of agency records that "contribut[e] significantly to public understanding *of the operations or activities of the government*," and thereby to "inform[] [citizens] about what their government is up to." *United States Dep't of Def.* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989)). Just as the "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind," *Reporters Comm.*, 489 U.S. at 765, the disclosure of commercial or financial information about private individuals, businesses, and other organizations is not what Congress designed FOIA to address.

Exemption 4 thus serves an important limiting function by protecting commercial and financial information about nongovernment entities obtained from outside the government and information furnished in confidence. Those protections are necessary to prevent FOIA from being transformed into a means to obtain commercial and financial data about marketplace competitors and other private individuals and entities whose information is aggregated in government files. See Pet. Br. 34.

ii. This Court's interpretation of FOIA Exemption 7(D) also reinforces the foregoing construction. Exemption 7(D) protects both the "identity of a confidential source" who has provided "information on a confidential basis" and the information he has furnished. 5 U.S.C. 552(b)(7)(D). In *Landano*, the Court adopted the "common usage" of the word "'confidential'"—as

embodied in its dictionary definition—to conclude that "[a] statement can be made 'in confidence'" where "the speaker expects that the information will not be published indiscriminately." 508 U.S. at 173. That understanding is consistent with the Conference Report on the 1974 amendments that enacted Exemption 7(D), which explained that the Exemption protects information about a source's identity "if the source 'provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.'" *Id.* at 172 (citation omitted).

Landano approved an objective test for determining whether "an implied assurance of confidentiality fairly can be inferred," based on "generic circumstances" surrounding the communication that would "characteristically support an inference of confidentiality." 508 U.S. at 177, 179. Circumstances supporting a "reasonable" inference that a typical informant would "normally expect [his] cooperation * * * to be kept confidential," the Court explained, include factors such as the "nature of the informant's ongoing relationship with the [government]" and "the nature of the crime and the source's relation to it." *Id.* at 179.

That analytical approach to Exemption 7(D) closely parallels the objective assessment of whether information is "confidential" under Exemption 4 above, which considers how the information is customarily treated outside the government and objective factors surrounding submission of information to the government. Where such context supports a "reasonable expectation of confidentiality," *Landano*, 508 U.S. at 173, the information is "confidential" under Exemption 4.

2. The D.C. Circuit's National Parks *test is atextual and wrong*

In 1974, the D.C. Circuit in *National Parks* held that information is "'confidential'" under Exemption 4 if its disclosure "is likely" either "(1) to impair the Government's ability to obtain necessary information in the future"; or "(2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770. Although respondent purports to defend "the *National Parks* interpretation of 'confidential' commercial information," Br. in Opp. 30, respondent never attempts (*id.* at 29-34) to identify any textual basis for it.

a. *National Parks* likewise never attempted to base its reformulation of "confidential" on FOIA's text. Before *National Parks*, the D.C. Circuit had construed "confidential" in accord with its ordinary meaning. See, *e.g.*, *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 709 (1971) (Exemption 4 protects "the type [of information] 'which would customarily not be released to the public by the person from whom it was obtained.'"); *Grumman Aircraft Eng'g Corp.* v. *Renegotiation Bd.*, 425 F.2d 578, 582 (1970) (Exemption 4 protects what the submitter "would not reveal to the public."). The *National Parks* court acknowledged those earlier decisions, 498 F.2d at 766-767, but determined that, notwithstanding its prior understanding of "'confidential,'" "[a] court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption," *id.* at 767. *National Parks* then divined that "purpose" principally from witness statements about certain dangers of disclosure in congressional hearings held in a prior Congress *before* text had been drafted for Exemption 4.

Id. at 768-769. And after inferring that Exemption 4's purpose was to "encourag[e] cooperation with the Government by persons having [useful] information" and prevent "competitive disadvantages which would result from [the] publication" of "financial or commercial data," the court narrowed Exemption 4 to cover those two situations. *Id.* at 768, 770.

That flawed analytical approach reflects a bygone era of statutory construction and is untethered to any appropriate interpretive guideposts. This Court has emphasized that it is not the courts' role "to rewrite [a] statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis* v. *City of Chicago*, 560 U.S. 205, 215 (2010). It is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Those provisions are interpreted according to the actual text of the "law enacted by Congress," which "need not be seconded by a committee report"—much less by witness statements in hearings predating the legislative text—to have "operati[ve]" effect. *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 326 (2008).

Moreover, nothing in the ordinary meaning of "confidential" supports *National Parks'* view that commercial information furnished to the government is "confidential" only if its disclosure would be likely "to impair the Government's ability to obtain necessary information in the future" or "to cause substantial harm to the competitive position of the person from whom the information was obtained," 498 F.2d at 770. The government's ability to obtain *other* information in the future does not determine whether the particular com-

mercial information at issue in the FOIA request is currently "confidential." Nor is a likelihood of future competitive harm—or, more precisely, competitive harm that qualifies as "substantial" in the view of an agency or court—the measure of whether information is, in fact, "confidential." Had Congress intended such complicated inquiries under Exemption 4, it would have provided a textual basis for them. Cf. Pet. Br. 36 n.21 (citing statutes requiring similar inquiries).

b. In 1991, the government petitioned the en banc D.C. Circuit to overturn *National Parks'* interpretation of "confidential," which members of that court had already criticized as "'fabricated, out of whole cloth.'" *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872, 875 (1992) (en banc) (*Critical Mass*) (quoting prior opinion), cert. denied, 507 U.S. 984 (1993). But rather than overrule *National Parks*—and without determining whether *National Parks* was correctly decided—the en banc court upheld its "definition of 'confidential'" as a matter of stare decisis, *id.* at 875-879, but limited that definition to contexts involving "information that persons are *required* to provide the Government," *id.* at 872 (emphasis added). The en banc court then adopted a *different* definition of "'confidential'" for information "given to the Government voluntarily." *Ibid.* Under that alternative definition—which reflects the term's ordinary meaning—information is "confidential" if "it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 879; see *id.* at 872, 880.

The result is that the D.C. Circuit has now created disparate definitions for the same term to apply in different contexts. That effectively creates, without a textual basis, two distinct exemptions. This Court recently

rejected a similarly anomalous doctrine creating "High" and "Low" versions of Exemption 2 without textual justification. *Milner v. Department of the Navy*, 562 U.S. 562, 566-567, 569-570 (2011). The Court should follow the same course here.

3. *Respondent's arguments for adopting the* National Parks *test are unpersuasive*

Rather than address Exemption 4's text, respondent invokes (Br. in Opp. 30-34) a principle of narrow construction and non-statutory sources to support *National Parks*. None of those contentions has merit.

a. First, respondent invokes this Court's statement that "FOIA exemptions are to be narrowly construed." Br. in Opp. 30 (quoting *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982)); see, *e.g.*, *Milner*, 562 U.S. at 571-572 (applying narrow construction by simply "confining the provision's meaning to its words"). But this Court has not yet applied that principle to Exemption 4, and, if applied here, the Court should apply it with caution.

This Court has made clear that Congress established in FOIA a "basic policy" favoring disclosure, but also sought to protect the "important interests served by the exemptions." *Abramson*, 456 U.S. at 630-631. The Court has therefore concluded that FOIA's Exemptions —which embody Congress's determination that "public disclosure is not always in the public interest," *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985)—should be given "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

Such a balanced approach to FOIA is warranted because "no law pursues its purpose at all costs," and when Congress enacts "textual limitations upon a law's scope"—like FOIA's Exemptions—those limitations

"are no less a part of its 'purpose' than [the law's] substantive authorizations." *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) (citation omitted). Indeed, Congress designed FOIA to "balance the opposing interests" involved, and thereby sought to achieve the "fullest *responsible* disclosure" by adopting "a workable formula which encompasses, balances, and protects all interests." *Senate Report* 3 (emphasis added); see *House Report* 6 (FOIA "strikes a balance" between "the right of the public to know" and the need "to keep information in confidence.").

Moreover, no proposition of narrow construction warrants adding atextual limitations to the language that Congress enacted in Exemption 4. This Court has construed FOIA's Exemptions "consistent with the plain meaning of [their text]," *Milner*, 562 U.S. at 581, and has rejected interpretations that "require[] [the court] to read into the FOIA [language] that Congress did not itself provide," *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989). No understanding of the term "confidential" and nothing in FOIA's statutory context can salvage *National Parks*.

b. Second, respondent relies (Br. in Opp. 16, 30-31) on a 1978 committee report, H.R. Rep. No. 1382, 95th Cong., 2d Sess. (*1978 Report*), to defend *National Parks*' substantial-competitive-harm test. But nothing that a committee of the 95th Congress may have said in that report could shed meaningful light on the intent of the 89th Congress that enacted Exemption 4. This Court has repeatedly held that such "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.'" *United States* v. *Woods*, 571 U.S. 31, 48 (2013) (quoting *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011)) (brackets in original).

The 1978 Report, which did not report on any proposed legislation, did not even purport to determine the proper interpretation of Exemption 4. It simply described the then-current state of the lower courts' decisional law without "consider[ing] the merits of the substantial competitive harm test" or "delv[ing] deeply into the scope of [E]xemption 4." *1978 Report* 22. Indeed, the report acknowledged that *National Parks* "ha[d] been severely criticized"; recognized that "[m]any contend that [its test] is too narrow to protect all business records that should be accorded confidential treatment" under Exemption 4; and emphasized that it was "not yet clear that [the D.C. Circuit had] reached the only right answer." *Id.* at 21.

c. Finally, respondent states (Br. in Opp. 31) that the "likelihood-of-substantial-competitive-harm analysis has been adopted in numerous federal regulations" as the test for "confidential" information. But such regulations governing records disclosure simply reflect that the government has been required to operate under the lower courts' widespread adoption of the *National Parks* test. After *National Parks* had taken root, the President issued Executive Order No. 12,600, 3 C.F.R. 235 (1987 comp.) (5 U.S.C. 552 note), to require agencies to "establish procedures" governing the processing of FOIA requests for "'[c]onfidential commercial information'" when it is "arguabl[e]" that "disclosure could reasonably be expected to cause substantial competitive harm." §§ 1, 2(a), 3 C.F.R. 235-236. Those procedures—which require notifying submitters of a possible disclosure of their information and instruct agencies to consider the grounds that submitters identify for non-disclosure, §§ 1, 4-5, 3 C.F.R. 235-237—are a practical necessity for agencies to evaluate, as

National Parks requires, whether disclosure would likely cause "substantial" competitive harm to private parties. That need to make that determination underscores *National Parks*' defects. "Congress' intent [in FOIA was] to provide '*workable* rules' of FOIA disclosure." *Landano*, 508 U.S. at 180 (emphasis added; citations and internal quotation marks omitted); accord *Reporters Comm.*, 489 U.S. at 779; *FTC* v. *Grolier Inc.*, 462 U.S. 19, 27 (1983). Yet *National Parks*, through its "atextual" and "unsupported interpretation" of Exemption 4, has necessitated an unduly complicated and "amorphous test" requiring "judicial speculation about" the likely degree of competitive downstream effects of disclosure. *New Hampshire Right to Life* v. *Department of Health & Human Servs.*, 136 S. Ct. 383, 384-385 (2015) (Thomas, J., dissenting from the denial of certiorari) (criticizing *National Parks*).

B. Store-Level Redemption Information Is "Confidential"

Applying the correct understanding of "confidential," store-level SNAP-redemption information is "confidential" under Exemption 4. Although such information is not customarily released publicly by retailers, that factor is likely insufficient in itself to render it "confidential" in this particular context. The information is nevertheless "confidential" under Exemption 4 because it was reasonably communicated in confidence to USDA in the context of USDA's repeated assurances that such redemption data would not be publicly disclosed.

1. Stores maintain their SNAP-redemption data as confidential

The record reflects that retail food stores do not customarily disclose publicly their SNAP-redemption data.

See Pet. Br. 43-46. That showing would be sufficient in many contexts to establish the "confidentiality" of the information under Exemption 4. After all, Exemption 4 was understood at the time of its enactment to protect "business sales statistics," which "would not customarily be made public by the person from whom it was obtained." *House Report* 10. SNAP-redemption information—a type of business sales statistic—fits that description.

But whether particular information is properly considered "confidential" must also take into account the context in which that information appears. Certain information obtained from nongovernment entities, for instance, is itself intimately linked to the government's own actions, actions that one would not reasonably expect to be kept confidential absent some agreement or requirement to that effect. And if disclosure of the government's own actions would effectively disclose the information in question, no expectation of confidentiality would be objectively reasonable.

The amount that the government pays a private entity to supply goods or services to the government, for instance, is information about *action taken by the government itself*, which may generally be disclosed to the public. See, *e.g.*, Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, §§ 2(a)(2), (b)(1)(A), and (B), 3, 120 Stat. 1186-1187, 1189 (generally requiring public disclosure of the "name" of the recipient, and the dollar "amount," of unclassified federal "contracts, subcontracts, purchase orders," "grants, subgrants, loans," and similar federal awards); 5 C.F.R. 293.311(a)(1) and (4) (requiring public disclosure of names and salaries of most federal employees); 48 C.F.R. 4.603(a) ("[A]ll unclassified Federal [contract] award

data must be publicly accessible."). FOIA's "core purpose" is to "inform[] [citizens] about what their government is up to" by making available information about the "activities of the government." *DoD*, 510 U.S. at 495 (citations and emphasis omitted). Among the most significant actions a federal agency takes is action expending public funds. Indeed, the "protection of the public fisc is a matter that is of interest to every citizen," *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 262 (1986), and FOIA was enacted in part to address dissatisfaction with earlier failures to disclose information about agency management of "billions of dollars' worth of Federal construction projects," *House Report* 6. Disclosure of the amount and source of government procurements is important to democratic accountability. Such disclosure allows an appropriately informed public debate about the expense of government action, the entities from which the government procures products and services, the payments they receive in return, and how such agency expenditures can affect winners and losers in the marketplace.

In this case, store-level SNAP-redemption data necessarily corresponds to the government's own payments of federal funds (through EBT processors) to the stores. That fact significantly diminishes any basis for finding the information to be "confidential" for purposes of Exemption 4. Indeed, if not for other statutory constraints on its ability to disclose the information, USDA informs this Office that it would now likely elect to release store-level redemption data nationwide.[5]

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[5] USDA has also informed this Office that if Congress had not recently amended Section 2018(c), it might have explored changing its position to permit the release of store-level redemption data collected after such a change.

2. The government has for decades assured retailers that their SNAP data will not be publicly disclosed

This Court need not determine whether store-level SNAP-redemption information is "confidential" based on how stores treat the data, however, because the information was communicated in confidence to USDA in light of the government's repeated and consistent statements over several decades that it would not publicly disclose it. Where, as here, "the Government has obligated itself in good faith not to disclose documents or information which it receives," such materials are "confidential" under the ordinary meaning of the word, and Exemption 4 enables the government "to honor such obligations." *House Report* 10.

a. The government's public assurances from 1978 onward about the confidentiality of stores' redemption data were made during USDA's implementation of the regulatory framework first established in 1977 by Section 2018(c). Section 2018(c) then, as now, contains two salient components. First, Section 2018(c) provides that USDA regulations "shall require an applicant retail food store * * * to submit information" that will permit a determination to be made whether "such applicant qualifies, or continues to qualify, for approval." 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977). Second, Section 2018(c) protects such information in two independent ways: (1) It has directed since 1977 that regulations "shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by [Section 2018(c)] to purposes" specified therein, and (2) it has made it a criminal offence since 1994 to "publish[], divulge[], disclose[], or make[] known in any manner or to any extent not authorized by Fed-

eral law (including a regulation) any information obtained under [Section 2018(c)]." 7 U.S.C. 2018(c); see 7 U.S.C. 2018(c) (Supp. I 1977).

The government's long history of assurances began with USDA's 1978 implementing regulations announcing that "information furnished [to USDA] by firms" under Section 2018(c) included "*their redemptions of coupons*," and that such redemption information "*may not be used or disclosed* to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations." 7 C.F.R. 278.1(*l*) (1979) (emphases added).

By 1985, Congress itself understood that, because of Section 2018(c)'s prohibition against disclosure, "State agencies [could not] be informed of * * * redemption information" that USDA collected from retail stores. H.R. Rep. No. 271, 99th Cong., 1st Sess. Pt. 1, at 155 (1985). To allow USDA to share such information with "State agencies administering the special supplemental food program for women, infants and children (WIC)," *ibid.*, Congress amended Section 2018(c) to authorize disclosures for that purpose. Food Security Act of 1985, Pub. L. No. 99-198, § 1521, 99 Stat. 1579-1580. USDA accordingly announced that the 1985 amendment authorized it to share with WIC agencies the "food stamp redemption figures * * * obtained from firms" that Section 2018(c) otherwise protected from disclosure. 51 Fed. Reg. 43,612, 43,613 (Dec. 3, 1986). USDA then updated its regulation prohibiting disclosure of "redemptions of coupons" to add that exception. 7 C.F.R. 278.1(r) (1988).

In 1994, Congress again revised Section 2018(c) because it prohibited disclosure of "information provided by retail food stores"—including "food stamp redemp-

tion information"—to law-enforcement and investigative agencies. H.R. Rep. No. 352, 103d Cong., 1st Sess. 5 (1993). That amendment to Section 2018(c) authorized disclosure to such agencies and, in addition, added a new criminal prohibition against disclosing "any information obtained under [Section 2018(c)]" when disclosure is "not authorized by Federal law (including a regulation)." Food Stamp Program Improvements Act of 1994, Pub. L. No. 103-225, § 203, 108 Stat. 108-109.

USDA again amended its regulation to reflect that "expan[sion]" of its authority to share information from "retail food concerns—including information about food stamp redemptions"—with law-enforcement and investigative agencies. 61 Fed. Reg. 68,119, 68,120 (Dec. 27, 1996); see 60 Fed. Reg. 25,625, 25,626 (May 12, 1995) (explaining the new authorization to disclose "food stamp redemption data"). In light of Section 2018(c)'s new criminal prohibition against disclosing information obtained from retailers under Section 2018(c) except when authorized by law or regulation, USDA altered its implementing regulation—which had previously stated that information *may not* be disclosed except as provided—to provide that "redemption data" and other information obtained under Section 2018(c) for determining a firm's "continued eligibility" "*may* be disclosed" in the circumstances it identified. 7 C.F.R. 278.1(r) (1997) (emphasis added); accord 7 C.F.R. 278.1(q).

USDA has also repeatedly announced in the Federal Register that the information it obtains from retailers under Section 2018(c) and uploads to STARS "includes * * * redemption data" that may be disclosed only as authorized under Section 2018(c). 75 Fed. Reg. 81,205, 81,207 (Dec. 27, 2010); see also 64 Fed. Reg. 17,604, 17,606 (Apr. 12, 1999) (explaining that Section 2018(c)

governs disclosure of "redemption data"); 61 Fed. Reg. 63,815, 63,815 (Dec. 2, 1996) ("[S]ection 9(c) of the Food Stamp Act," *i.e.*, Section 2018(c), regulates disclosure of "redemption data.").

Those consistent and repeated public statements by USDA reflect a "long-standing policy" of protecting store-level SNAP-redemption data as confidential under regulations implementing Section 2018(c). J.A. 71. Retailers that have participated in SNAP have accordingly done so under a reasonable expectation that such data would not be publicly disclosed. For that reason, the redemption information was "communicated in confidence" and is thus "confidential" under Exemption 4.

b. In 2014, the Eighth Circuit concluded in this case that Section 2018(c)'s criminal prohibition against disclosure did not apply to SNAP-redemption data. It recognized that Section 2018(c) both applies to information "submit[ted]" by retail stores and prohibits disclosing information "obtained under [Section 2018(c)]," 7 U.S.C. 2018(c) (2012), but it concluded that Section 2018(c) did not apply to the redemption data requested by respondent because USDA "actually obtained [that data] from third-party [EBT] processors, not the retailers themselves." Pet. App. 54a-55a. That conclusion is incorrect, because that information is furnished by retailers to USDA through the EBT system. But this Court need not resolve definitively whether the Eighth Circuit erred, because even if it were correct, USDA's repeated statements that store-level SNAP-redemption data would not be publicly disclosed show that the information was communicated in confidence at the time. Even if USDA's underlying reasons for its assurances were incorrect, a retail store would have reasonably

concluded when it submitted the 2005-2010 information at issue that it was to be held by USDA in confidence.

The reasonableness of that conclusion flows not only from USDA's longstanding regulatory statements, but also from the recognition that USDA is properly understood to "obtain" redemption information from stores under Section 2018(c), even though the information is transmitted *through* the EBT system—just as USDA would be properly understood to "obtain" information from a store that had mailed it, even though the information was transmitted through the postal system. The EBT system is designed to transmit redemption information between the store and USDA, just like its predecessor system was designed to transmit food-stamp redemption-certificate forms from a store, through a bank, to USDA. See pp. 3-4, *supra*. Indeed, Congress has recently clarified—while certiorari was pending in this case—that Section 2018(c)'s application to information "submit[ted]" by stores "include[s] * * * redemption data provided *through* the [EBT] system." App., *infra*, 3a (emphasis added); see p. 9, *supra*.

C. Respondent's Jurisdictional Contention Lacks Merit

In its brief in opposition, respondent argued (at 28) that this is an "atypical" Exemption 4 case because the government declined to appeal the district court's judgment and that petitioner lacked Article III standing to pursue an independent appeal. Cf. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). The procedural posture of this case is indeed atypical, but the government concludes, under the circumstances of this case, that petitioner had Article III standing to appeal.

1. The current procedural posture, in which the government did not participate on appeal, is extraordinarily atypical for a FOIA action. When the government declines to appeal from a judgment requiring disclosure under FOIA, it presumptively signals "its acceptance of that decision, and its lack of interest in" continuing to withhold the requested agency records. See *Diamond* v. *Charles*, 476 U.S. 54, 63 (1986). Regardless of the outcome of an appeal brought by another person, the appeal could not result in any limitation on the agency's discretion to disclose its own records, because "FOIA is exclusively a disclosure statute" that prohibits only the improper "'*withholding* [of] agency records'" and does "not limit an agency's discretion to disclose information." *Chrysler Corp.* v *Brown*, 441 U.S. 281, 292, 294 (1979) (quoting 5 U.S.C. 552(a)(4)(B)) (emphasis added). "FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information," and it therefore confers no "right to enjoin agency disclosure." *Id.* at 293-294; see *GTE Sylvania, Inc.* v. *Consumers Union of the U.S., Inc.*, 445 U.S. 375, 378 n.2 (1980). Indeed, even if a district court's order *requiring* disclosure under FOIA is stayed pending appeal, the government could simply release the records itself, rendering any appeal moot. In short, nothing in an appeal by a nongovernment person could prevent the agency's disclosure of its own records.

For those reasons, a person opposing disclosure could not properly intervene as of right in a FOIA action under Federal Rule of Civil Procedure 24. Such a person is unable to plead its own FOIA-based "claim for relief" or a FOIA-related "defense[] to [any] claim asserted against it," Fed. R. Civ. P. 8(a) and (b)(1)(A), and

therefore cannot properly submit, as it must, a "pleading" asserting a "claim or defense" on which it might intervene as a party. Fed. R. Civ. P. 24(c); see *Diamond*, 476 U.S. at 76-77 (O'Connor, J., concurring in part and concurring in the judgment); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 548 & n.9 (1986) (stating that this pleading requirement is "particularly important"); *SEC* v. *Prudential Sec. Inc.*, 136 F.3d 153, 156 n.4 (D.C. Cir. 1998) (putative intervenor's proffered "pleadings [must] allege a legally sufficient claim or defense") (citation omitted). The litigant would also lack Rule 24(a)(2)'s requisite "significantly protectable interest," *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), to justify intervention under a pure FOIA theory, because FOIA offers no "legal protection" to such an interest. *Diamond*, 476 U.S. at 75 (O'Connor, J., concurring in part and concurring in the judgment) (explaining that *Donaldson* held that an individual's interest in preventing his employer's disclosure of the employer's records showing monetary payments to him was insufficient to warrant intervention as of right, because the interest in "overcom[ing] his employer's 'willingness, under summons, to comply and to produce records'" was not an interest enjoying "legal protection") (citation omitted).

The only proper course for a person opposing an agency's disclosure of records is to assert a so-called "reverse"-FOIA claim invoking the legal protection of a *different* statute creating a cause of action to set aside an agency decision to disclose records. That person, for instance, may sue under the APA to challenge agency action to disclose records on the ground that disclosure would be contrary to some other non-FOIA source of

law. *Chrysler Corp.*, 441 U.S. at 317-318. A plaintiff asserting such a claim could timely seek intervention in an existing FOIA case on the basis of that opposing claim, and the district court would then be able to resolve the FOIA and reverse-FOIA claims simultaneously.[6]

2. Petitioner did not assert any such claim in this case. But any separate objection to its intervention—including petitioner's failure to file a pleading to assert its own claim or defense under a statute (such as Section 2018(c)) independent of FOIA—was neither raised on appeal nor in respondent's brief in opposition. Such defects were thus forfeited on appeal and waived in this Court. See Sup. Ct. R. 15.2.

We also conclude, in the circumstances of this case, that petitioner had Article III standing to appeal. Although USDA in 2017 announced it would comply with the district court's judgment rather than appeal, it had previously given independent assurances that it would not disclose store-level redemption data, and then, significantly, it affirmatively assured the court that it would not release that data during petitioner's expected appeal. See pp. 7-9, *supra*. That background and forbearance, even though USDA could have released the data without a court order requiring disclosure, could reasonably be understood to create by the time that petitioner appealed a sufficient likelihood that petitioner's

---

[6] Another litigant did file an action against USDA in August 2018 in Texas with respect to the subset of store-level SNAP-redemption data in this case pertaining to Texas retailers, but it incorrectly did so as a belated collateral attack on the district court's judgment in this case. *Texas Retailers Ass'n* v. *USDA*, No. 18-50895, 2019 WL 548966 (5th Cir. Feb. 11, 2019) (per curiam) (vacating preliminary injunction prohibiting disclosure with instructions to await this Court's decision in this case).

threatened injury of disclosure would be redressed if petitioner prevailed on appeal. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 618-619 (1989). And now, USDA has confirmed that, if the district court's judgment mandating disclosure is reversed, USDA will not disclose that data in light of its understanding of its legal obligations under Section 2018(c), as recently amended. See pp. 30-31, *supra*.[7]

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter judgment against respondent.

Respectfully submitted.

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[7] If this Court concludes that the court of appeals correctly held that withholding was not permitted by Exemption 4, it would be appropriate for the Court to vacate and remand to the Eighth Circuit for further consideration in light of Congress's intervening amendment to Section 2018(c).

APPENDIX

1. 5 U.S.C. 551 provides in pertinent part:

Definitions

For the purpose of this subchapter—

* * * * *

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

* * * * *

2. 5 U.S.C. 552 provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

* * * * *

3. 7 U.S.C. 2018 (Supp. II 2014), as amended by the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4006(f)(3), 132 Stat. 4638 (enacted Dec. 20, 2018), provides in pertinent part:

Approval of retail food stores and wholesale food concerns

* * * * *

(c) Information submitted by applicants; safeguards; disclosure to and use by State agencies

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, purchase invoices, records relating to electronic benefit transfer equipment and related services, transaction and redemption data provided through the electronic benefit transfer system, or program-related records, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter, except that

such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C. 1786], for purposes of administering the provisions of that Act [42 U.S.C. 1771 et seq.] and the regulations issued under that Act. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

* * * * *

4. 7 U.S.C. 2018 (2012) provides in pertinent part:

Approval of retail food stores and wholesale food concerns

* * * * *

(c) Information submitted by applicants; safeguards; disclosure to and use by State agencies

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter, except that such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental

nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C. 1786], for purposes of administering the provisions of that Act [42 U.S.C. 1771 et seq.] and the regulations issued under that Act. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

* * * * *

5. 7 U.S.C. 2018 (Supp. I 1977) provides in pertinent part:

Approval of retail food stores and wholesale food concerns

* * * * *

(c) Information submitted by applicants; safeguards

Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter. Regulations issued pursuant to this chapter shall provide for safeguards which limit the

use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter.

* * * * *

6. 7 C.F.R. 278.1 provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

* * * * *

(q) *Use and disclosure of information provided by firms.* With the exception of EINs and SSNs, any information collected from retail food stores and wholesale food concerns, such as ownership information and sales and redemption data, may be disclosed for purposes directly connected with the administration and enforcement of the Food and Nutrition Act of 2008 and these regulations, and can be disclosed to and used by State agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Such information may also be disclosed to and used by Federal and State law enforcement and investigative agencies for the purpose of administering or enforcing other Federal or State law, and the regulations issued under such other law. Such disclosure and use shall also include companies or individuals under contract for the operation by, or on behalf of FNS to accomplish an FNS function. Such purposes include the audit and examination of such information by the Comptroller General of the United States authorized by any

other provision of law. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law or regulations any information obtained under this paragraph shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. Safeguards with respect to employee identification numbers (EINs) are contained in paragraph (q)(2) of this section. Safeguards with respect to Social Security numbers (SSNs) are contained in paragraph (q)(3) of this section.

(1) *Criteria for requesting information.* FNS shall determine what information can be disclosed and which government agencies have access to that information based on the following criteria:

(i) Federal and State law enforcement or investigative agencies or instrumentalities administering or enforcing specified Federal and State laws, or regulations issued under those laws, have access to certain information maintained by FNS. Such agencies or instrumentalities must have among their responsibilities the enforcement of law or the investigation of suspected violations of law. However, only certain Federal entities have access to information involving SSNs and EINs in accordance with paragraph (q)(1)(ii) of this section;

(ii) Except for SSNs and EINs, information provided to FNS by applicants and authorized firms participating in the FSP may be disclosed and used by qualifying Federal and State entities in accordance with paragraph (q)(1)(i) of this section. The disclosure of SSNs and EINs is limited only to qualifying Federal agencies or instrumentalities which otherwise have access to SSNs and EINs based on law and routine use. Release of information under this paragraph shall be limited to

information relevant to the administration or enforcement of the specified laws and regulations, as determined by FNS;

(iii) Requests for information must be submitted in writing, including electronic communication, and must clearly indicate the specific provision of law or regulations which would be administered or enforced by access to requested information, and the relevance of the information to those purposes. If a formal agreement exists between FNS and another agency or instrumentality, individual written requests may be unnecessary. FNS may request additional information if needed to clarify a request;

(iv) Disclosure by FNS is limited to: Information about applicant stores and concerns with applications on file; information about authorized stores participating in the FSP; and information about unauthorized entities or individuals illegally accepting or redeeming SNAP benefits;

(v) Requests for information disclosure by FNS may involve a specific store or concern, or some or all stores and concerns covered by paragraph (q)(1)(iv) of this section. In addition, FNS may sign agreements allowing certain government entities direct access to appropriate FNS data, with access to EINs and SSNs limited only to other Federal agencies and instrumentalities that otherwise have access to such numbers.

* * * * *

7. 7 C.F.R. 278.1 (1996) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

* * * * *

(q) *Safeguarding privacy.* Except for employer identification numbers (EINs) and social security numbers (SSNs), the contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, except that such information may be disclosed to and used by State agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Such purposes shall not exclude the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law. For safeguards with respect to EINs, see § 278.1(q)(1) below. For safeguards with respect to SSNs, see § 278.1(q)(2) below.

* * * * *

8. 7 C.F.R. 278.1 (1988) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

* * * * *

(r) *Safeguarding privacy.* The contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or

disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, except that such information may be disclosed to and used by State agencies that administer the Special Supplemental Food Program for Women, Infants and Children (WIC). Such purposes shall not exclude the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

* * * * *

9. 7 C.F.R. 278.1 (1983) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

* * * * *

(*o*) *Safeguarding privacy.* The contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations. Such purposes shall not exclude the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

* * * * *

10. 7 C.F.R. 278.1 (1979) provides in pertinent part:

Approval of retail food stores and wholesale food concerns.

* * * * *

(*l*) *Safeguarding privacy.* The contents of applications or other information furnished by firms, including information on their gross sales and food sales volumes and their redemptions of coupons, may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations.

* * * * *

No. 18-481

In The Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE AI NOW INSTITUTE, AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC FRONTIER FOUNDATION, CENTER ON RACE, INEQUALITY, AND THE LAW, AND KNIGHT FIRST AMENDMENT INSTITUTE AS *AMICI CURIAE* SUPPORTING THE RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici AI Now Institute at New York University, American Civil Liberties Union, Electronic Frontier Foundation, Center on Race, Inequality, and the Law at NYU School of Law, and Knight First Amendment Institute at Columbia University, are public interest organizations, each committed to public accountability in government. *Amici* rely on the Freedom of Information Act ("FOIA") to understand a broad variety of government activities, including those the government accomplishes by relying on private companies.[1]

Amici are concerned that an interpretation of Exemption 4 that allows companies to self-designate any document as "confidential" will significantly undermine public accountability and transparency of government. *Amici* fear that such a broad and subjective construction of Exemption 4 will severely hinder citizens' ability to understand how the government is operating whenever it carries out public functions with the aid of a contractor, vendor, or other private company. Individual organizational statements are contained in the Appendix following this brief.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of *amicus* briefs are on file with the clerk. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case directly implicates FOIA's central purpose "to open agency action to the light of public scrutiny" in order to "help ensure an informed citizenry, vital to the functioning of a democratic society." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quotations omitted). Because the government so often relies on private vendors or contractors to carry out core governmental functions, it is impossible to adopt an expansive interpretation of Exemption 4 without doing violence to FOIA's core purpose.

Exemption 4 is concerned with certain "commercial or financial information" but Petitioner Food Marketing Institute's ("FMI") proposed interpretation would do far more than exclude corporate information of purely private concern. In practice, it would exclude crucially important information about how the *government* operates, whenever those operations depend on private companies to support governmental functions. On FMI's interpretation, any government contractor or vendor that performs core governmental functions could simply decide that any record that pertains to it should be withheld, without any showing of competitive harm, simply because the record has not been made public and the company prefers to keep it that way.

If Exemption 4 means what FMI says it does, the public interest at the heart of the statute would be displaced by private interests in secrecy. The disclosure inquiry under FOIA would end at whether a contractor

or vendor would prefer something be deemed confidential. FOIA's longstanding presumption of disclosure would be replaced by a presumption of secrecy in every area where the government relies on private companies—which is nearly every part of the federal government. Agencies and their vendors would have incentives to hide information inside company documents that could then be ubiquitously withheld. This type of secrecy would frustrate democratic public accountability of government—precisely what FOIA was enacted to guarantee.

An expansion of Exemption 4 would be particularly devastating for the public's ability to understand government programs that increasingly depend on emerging and complex technology developed by private companies. The government relies extensively on the private sector to provide technology that is central to all manner of government activities—from "big data" algorithmic decisionmaking systems, to powerful surveillance technology, to the government's core information infrastructures—and this reliance is sure to increase going forward. It is critical to cabin Exemption 4's reach so that the public is not left without the ability to understand core governmental activities by accessing records about the private sector technologies on which those activities depend.

For example, the government is increasingly relying on private-sector artificial intelligence ("AI") and algorithmic systems to make decisions that directly affect people's rights and opportunities including setting pre-trial detention, bail, criminal sentences, and parole

eligibility; charging an individual with a crime; removing a child from a home; and determining Medicaid benefits. All such technologies can easily encode biases—racial, or otherwise—and programming errors that lead to inaccurate or unfair results. As a result, when deployed by government, these private sector algorithms can systemically deprive individuals of rights and opportunities that the government is charged with protecting.

The government also relies on the private sector for increasingly powerful surveillance technology including extremely precise location tracking, interception of network traffic, surreptitious computer hacking, and even automated physical surveillance using video cameras.

And private companies provide the government's data infrastructure, which handles the most sensitive information about individuals, including, in at least one instance, the quintessentially governmental task of verifying identity and providing a "government-issued" identification card.

These and other private-sector technologies increasingly define how government programs operate, how they affect individuals, and whether they may infringe on constitutional rights and liberties. But in most of these domains, the purchasing agency will not have detailed knowledge of how a particular technology works. That expertise is provided by the private company. In order to understand how government functions, it is essential for the public to be able to see documents provided to the government by private companies.

This Court should interpret Exemption 4 with these concerns firmly in mind. The statute's protection for "confidential" commercial information "obtained from a person" should not be interpreted to shroud vast swathes of governmental activity in secrecy solely because a private company has some private, subjective interest in secrecy.

There are strong reasons to reject the expansive and subjective definition of "confidential" commercial information proposed by FMI. That definition would fly in the face of decades of judicial precedent holding that FOIA exemptions must be narrowly interpreted. It would render the rest of Exemption 4's text, regarding "trade secrets," superfluous. It would also make a hash of Congress' painstaking work over decades to enact an array of narrowly targeted commercial secrecy exemptions. An expansive interpretation of Exemption 4 would thus risk overriding Congress' careful balancing of interests in disclosure and nondisclosure. FMI's proposed reading would also create a haphazard, unpredictable, and disorderly situation in which the scope of governmental secrecy depends not on any objective test or shared notion of confidentiality, but rather on each contractor or vendor's subjective preference for secrecy.

In addition, FMI's test—as applied in this case—would obliterate the exemption's textual limitation to information "obtained from a person." It would instead allow a private entity to prevent disclosure of information that is created by the government and which

belongs to the government, on the theory that a private company can object to any record that happens to include information about it that it prefers not to make public.

The Court should reject FMI's invitation to gut Exemption 4's crucial limits. *Amici* respectfully ask this Court to maintain the *National Parks* standard that has applied for over forty years to determine whether information in a FOIA document is "confidential," or to adopt a similar test that imposes an objective standard to determine whether disclosure of information would cause competitive harm or undermine another legitimate public interest. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The Court should also clarify that the exemption is strictly limited to records actually "obtained from" a private party. These tests provide a framework by which Exemption 4 can serve its legitimate but narrow goal, while preserving FOIA's core purpose of allowing the public to understand what its government is doing.

ARGUMENT

I. The scope of Exemption 4 bears directly on the public's ability to learn about core government activities that rely on private companies.

Passed in 1966 and strengthened several times since, FOIA "is often explained as a means for citizens

to know what the Government is up to." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2003) (quotation marks omitted). As this Court has noted, the statute's "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 779 (1989). This purpose serves "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). These interests are implicated whenever governmental functions are involved, no less so when the government has contracted with private entities to assist in these functions.

Consistent with this purpose, "FOIA . . . mandates that an agency disclose records on request, unless they fall within one of nine exemptions, [which] are 'explicitly made exclusive,' and must be 'narrowly construed,'" *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)). This statutory structure permits the public "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation marks omitted); *Tax Analysts*, 492 U.S. at 142.

The transparency guaranteed by FOIA is a "structural necessity in a real democracy." *Nat'l Archives*, 541 U.S. at 172. Congress has repeatedly recognized FOIA

as central to our system of democratic accountability. The original 1966 bill passed by an overwhelming margin in both chambers of Congress. 120 Cong. Rec. H1787-H1803 (1974); 120 Cong. Rec. S9310-S9343 (1974). Congress strengthened FOIA in 1974, overriding a presidential veto to do so. 120 Cong. Rec. H10864-H10875 (1974); 120 Cong. Rec. S19806-S19823 (1974). FOIA has been amended repeatedly since then, most recently in 2016, in order to reinforce and further expand its reach. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185.

FOIA's unequivocal statutory purpose to open up government to public scrutiny remains fully engaged when the government chooses to enlist the aid of private companies to do government work. The public has an especially strong interest in being able to understand and oversee how private entities carry out public functions. The limits of Exemption 4, which exempts "commercial or financial information obtained from a person [that is] privileged or confidential," 5 U.S.C. § 552(b)(4), therefore directly implicates FOIA's core statutory purpose. If the exemption is defined so broadly that it can exempt essentially any records provided to the government and designated as confidential by private companies, it threatens to undermine the central objective of FOIA in every domain where the government relies on private companies.

II. Because the government relies on private companies for key technologies, an expansive interpretation of Exemption 4 would shroud many important government activities in secrecy.

The government frequently acts with the assistance of private companies. As of 2015, over forty percent of the federal workforce was employed by contractors. *See* Neil Gordon, *Contractors and the True Size of Government* (Oct. 5, 2017), https://perma.cc/8X38-ZRYJ. The government relies on private parties to do government work in many familiar contexts, like operating prisons and detention facilities. Exemption 4 has already been used in attempts to limit the public's understanding of that exercise of quintessentially governmental power. *See, e.g.*, *Det. Watch Network v. United States Immig. & Customs Enforcement*, 215 F. Supp. 3d 256 (S.D.N.Y. 2016).

The danger that Exemption 4 will be used to shield government work from the public eye is only increasing as the government turns to the private sector for technology to help carry out central functions in an enormous variety of domains. The government deploys artificial intelligence and algorithmic systems to inform decisions that affect fundamental liberty and property interests. It has purchased powerful surveillance technology that empowers law enforcement to engage in precise, pervasive location tracking and other intrusive surveillance that was previously impossible. It relies on private companies to provide the bedrock information infrastructure of the government.

Companies that contract with the government are already afforded significantly more privacy in carrying out their work than federal offices doing the same jobs. Private companies are, of course, not directly subject to FOIA, even when operating as contractors. In the tech sector, in particular, the intricacies of complex systems and programming serve to diminish oversight—policymakers and government officials often lack the expertise to identify problems. Engineers, in turn, may not be fully informed about what they are creating for the government, or all of the ways their technology will be used by agencies. *See* Emily Manna & Jesse Franzblau, *Government Inc.: Amazon, Government Security & Secrecy*, Open the Government, at 16-17 (2019), https://perma.cc/T3KS-TDE4.

Expanding Exemption 4 would thus prevent the public from answering important questions across a variety of domains where technology is transforming the powers and processes of government. It could render the public unable to determine whether technology is accurate, systemically biased, infringing individual rights, or even doing the job it is intended to do. The Court should not give private companies the power to prevent the public from investigating these questions using FOIA.

A. Privately developed artificial intelligence and automated decisionmaking systems perform a growing number of core governmental functions.

Automated decisionmaking and AI systems are transforming governmental administration across numerous domains, including health, education, criminal justice, parental rights, and public benefits. These systems are typically developed by private companies on behalf of the government. If Exemption 4 is expanded to include any records these private companies designate as "confidential," it will become effectively impossible to use FOIA as it was meant to be used—to understand how the government is making decisions in an ever-growing number of contexts.

AI and other automated systems aid (and sometimes replace) human decisionmaking by processing a variety of inputs through algorithms designed to produce results optimized according to some predetermined criteria. At the most basic level, an algorithm is just a computational procedure—a series of steps—that transforms inputs into an output. *See* Thomas Cormen et al., Introduction to Algorithms 5 (3d ed. 2009). It is like a manual or a recipe: a set of instructions for how to build something from raw materials.

Some contemporary algorithmic systems used in government simply attempt to take particular processes or rules and automate them in software. Increasingly, however, the government is relying on

private companies to develop statistical "machine learning" systems, which analyze large datasets to identify how various features in the data are correlated with a particular desired outcome. The system "learns" which features are most predictive of the desired result, and produces a model that can be applied to new cases to generate predictions. If a simple algorithm is akin to a recipe, machine learning systems analyze data to generate their own recipes, which can then be put to use.

Contrary to popular mythology, these types of computer systems are not infallible or objective in any meaningful sense. They are complex software systems the design of which involves innumerable decisions by human beings—engineers, data scientists, and coders. Those decisions can and do introduce bias, error, and hidden assumptions. *See* Vera Eidelman, *The First Amendment Case for Public Access to Secret Algorithms Used In Criminal Trials*, 34 Ga. St. U. L. Rev. 915, 923-32 (2018).

Even "simple" rules-based algorithmic systems can easily be infected by human coding errors, which can go unidentified for years. Problems are even more difficult to identify with respect to predictive systems built on "big data" machine learning techniques. Among other difficulties, these systems reflect and potentially amplify any biases and inadequacies in the datasets that they are trained on, potentially producing a model that makes systemically flawed predictions. Moreover, even if a model is well-tuned to one application, it may produce misleading results when

deployed in circumstances that differ from those for which it was originally designed.

These errors can produce flatly inaccurate results, or results that are systemically biased. *See* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Cal. L. Rev. 671 (2016). Moreover, it is often difficult to understand why an algorithmic system produces a particular result. The algorithm's workings are typically inscrutable to the government officials who rely on them and to members of the public who are subject to their decisions. *See* Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 Fordham L. Rev. 1085 (2018); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. Rev. 93 (2014); Danielle Citron, *Technological Due Process*, 85 Wash. U. L. Rev. 1249 (2008). The algorithmic system typically does not "show its work" or explain its reasoning—it simply issues a result.

The government already relies on algorithmic systems for a diverse array of decisions. *See* Robert Brauneis & Ellen Goodman, *Algorithmic Transparency for the Smart City*, 20 Yale J. L. & Tech. 103 (2018). In the future, these tools could transform nearly every domain of public administration. Allowing vendors to keep all documentation about these systems hidden from the public under Exemption 4 would be a catastrophe for the public's ability to understand governmental decisionmaking in the digital age.

a. At all levels of the criminal legal system, judges and other state actors are relying directly on algorithmic tools to make decisions about pretrial detention, bail, sentencing, and parole. Erin Harbison, *Understanding 'Risk Assessment' Tools*, Bench & B. Minn. (Aug. 3, 2018), https://perma.cc/7W7N-75CX. These tools purport to predict the risk that an individual will require rehabilitative resources while on parole, commit another offense after conviction, pose a threat to public safety, or fail to appear in court. *See* Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 Ohio St. J. Crim. L. 583 (2018). They rely on actuarial techniques to make predictions based on analysis of historical data. *See, e.g.*, Natalie Ram, *Innovating Criminal Justice*, 112 Nw. U. L. Rev. 659 (2018); Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 96 Wash. U. L. Rev. 681 (2018). The appeal of risk assessment algorithms lies in their promise to objectively classify the likelihood of recidivism or failure to appear. *See* Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 Duke L. J. 1045, 1047-48 (2019).

While these algorithms may be intended to reduce the possibility of bias on the part of a judge, like all algorithmic systems, they are themselves susceptible to bias. Sources of potential bias range from the disproportionate representation of people of color at all stages of the criminal legal process, to the possibility of bad data being used to teach the algorithm, to coding errors, to reliance on factors that are proxies for race

or other prohibited grounds for decision. *See, e.g.*, Bernard E. Harcourt, *Risk as a Proxy for Race*, 27 Fed. Sent'g Rep. 237 (2015). Furthermore, criminal risk assessment algorithms can be flat-out inaccurate. Without sufficient transparency, there is no way for the public to know whether any of these faults exist in a piece of software the government is using. *See State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), *cert. denied*, 137 S. Ct. 2290 (2017) (noting transparency, accuracy, and due process concerns require that "use of a COMPAS risk assessment must be subject to certain cautions").

In 2016, ProPublica released a report which detailed the racially biased results of COMPAS, a widely used risk assessment algorithm. According to ProPublica's data, the algorithm mistakenly labeled black defendants as higher risk twice as frequently as it mistakenly labeled white defendants as such. *See* Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, ProPublica (May 23, 2016), https://perma.cc/92WP-EXDJ.

These types of risk-scoring algorithms are often created by private companies for use by the federal and state courts. *Id.* Developers have resisted efforts to provide sufficient transparency about how their systems are developed and tested. For example, in response to the ProPublica study, Northpointe, which developed the COMPAS tool, refused to share its method of calculating risk scores on the theory that its methods are proprietary. *Id.*

Were it to expand Exemption 4, this Court could license private companies to make even broader secrecy claims regarding all manner of documentation they provide to government about their systems—even in contexts where the fundamental liberty interests of citizens are at stake.

b. Government agencies have begun to use AI-based biometric identification tools, such as facial recognition and tattoo recognition software, across a range of law enforcement applications. These tools raise serious questions about privacy, pervasive surveillance, and the risk of error, including racially disparate error rates.

In 2015, the Government Accountability Office published a report concerning facial recognition technology, which documented several privacy concerns associated with such tools. U.S. Gov't Accountability Office, GAO-15-621, *Facial Recognition Technology: Commercial Uses, Privacy Issues, and Applicable Federal Law* (2015). These include the reduction of anonymity and the possibility of misidentification. *Id.* at 13-17. The 2015 report expressed concern that facial recognition might misidentify individuals at a higher rate than other biometric techniques "because facial recognition technology systems are currently less accurate than other biometrics." *Id.* at 17. Indeed, this has proven to be the case. *See* Clare Garvie, Alvaro Bedoya & Jonathan Frankle, *The Perpetual Line-Up: Unregulated Police Face Recognition in America* (2016), https://www.perpetuallineup.org. A recent study revealed that Rekognition, face recognition

software developed by Amazon, is racially biased and significantly more accurate in recognizing lighter faces than darker faces.[2] Amazon's Rekognition software is in use by the government already; researchers focused on Amazon's system "following the revelation of the active use and promotion of its facial recognition technology in law enforcement[.]" Raji & Buolamwini, *supra*, note 2, at 3; *see also* Elizabeth Dwoskin, *Amazon Is Selling Facial Recognition to Law Enforcement—For a Fistful of Dollars*, Wash. Post (May 22, 2018), https://perma.cc/B5ST-C73B.

The public has a strong interest in accessing information related to which types of facial recognition software the government is using, in what ways it is being used, and the level of accuracy achieved. Expanding Exemption 4 could frustrate these goals by allowing companies to self-designate records as "confidential."

Amicus Electronic Frontier Foundation ("EFF") has already encountered such efforts to use Exemption 4 to impede basic transparency regarding biometric identification software that raises significant privacy and free expression concerns. In 2016 and 2017, EFF sought FBI and National Institute of Standards and Technology's ("NIST") records related to the agencies'

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[2] Inioluwa Deborah Raji & Joy Buolamwini, *Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products*, Association for the Advancement of Artificial Intelligence (2019), https://perma.cc/7XJ7-L77L; Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 Proceedings of Machine Learning Research 1 (2018).

development of automated tattoo recognition technology. *See* Complaint, *Elec. Frontier Found. v. Dep't of Commerce*, No. 17-cv-2567 (D.D.C. Nov. 30, 2017). NIST researchers created a thirteen-page presentation summarizing an early phase of their research. The FBI released the title page, but it withheld the remaining twelve pages under Exemption 4. The presentation, which was ultimately disclosed, contained information on NIST's goals for tattoo recognition technology, testing protocols, and information on the origin of its dataset. If Exemption 4 had been defined as broadly as FMI wishes, EFF's would probably not have been successful and the report would have remained secret. Expanding Exemption 4 could thus leave the public in the dark about how the government develops biometric identification technologies and the accuracy of its systems.

c. Governments are also implementing automated decisionmaking systems to evaluate the performance of employees including, for example, public school teachers. A school district in Texas implemented one such "data driven" teacher evaluation model through privately developed software that purported to compare the results of a teacher's students to classroom statistics across the state and within the teacher's prior performance record. Teachers sued the district, arguing that the software was fundamentally inscrutable and that there was no way for teachers to know whether the software was accurately assessing their job performance. *See Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 251 F. Supp. 3d

1168, 1171 (S.D. Tex. 2017). The court agreed, holding that the "teachers have no meaningful way to ensure correct calculation of their [evaluation] scores, and as a result are unfairly subject to mistaken deprivation of constitutionally protected property interests in their jobs." *Id.* at 1180. Similar systems purporting to measure the efficacy of government employees are likely to proliferate. Without meaningful transparency, these systems will raise serious concerns about fairness and accuracy.

d. Government agencies are using algorithmic tools to make decisions about how to ration federally-funded medical benefits, including essential medical services that severely disabled people receive from Medicaid. *See Ark. Dep't of Human Servs. v. Ledgerwood*, 530 S.W.3d 336 (Ark. 2017) (upholding an order enjoining the state from using its algorithm-based assessment tool to calculate attendant care hours, and finding irreparable harm to profoundly disabled beneficiaries); *K.W. ex rel. D.W. v. Armstrong*, 180 F. Supp. 3d 703 (D. Idaho 2016) (finding that algorithmic system used to calculate Medicaid benefits violated Due Process); *Michael T. v. Bowling*, No. 15-cv-09655, 2016 U.S. Dist. LEXIS 123749 (S.D. W. Va. Sept. 13, 2016).

These algorithms purport to make the state's allocation of scarce resources more efficient, but they are easily infected with grave defects. In one case, a court found that the state's automated Medicaid budgeting system was so unreliable that it "arbitrarily deprive[d] participants of their property rights and hence violate[d] due process." *K.W. ex rel. D.W.*, 180 F. Supp. 3d

at 718. In the same case, the court found that the ability of patients to appeal was frustrated by the state's refusal to provide a manual for a disability scoring tool furnished by a private company. *Id.* at 717. In the absence of basic transparency—which an expanded interpretation of Exemption 4 would frustrate—it will be impossible to audit the reliability and fairness of similar automated systems.

e. Child protective services ("CPS") agencies are also using automated decisionmaking systems to identify children at risk of abuse, neglect, or fatality. *See* Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (2019). These agencies have deployed predictive algorithms in an attempt to more efficiently utilize CPS resources. But, as with other predictive systems, they are susceptible to error and bias latent in the datasets they are built upon and the factors used to predict risk. For example, because these systems are based on datasets derived from a variety of government agency sources with which lower-income families are more likely to interact, there is a risk that they will have disproportionately negative effects on lower-income families. Information about low-income families is more abundant and more accessible to CPS than that of families that have resources to access private services that are not visible to CPS, like mental health care. This can amplify disparate outcomes, particularly in jurisdictions with a high prevalence of neglect cases, because most neglect cases are related to poverty (e.g., inadequate provisions of food). In such circumstances, these

predictive systems are likely to find correlations between low-income status and child neglect and then to disproportionately target CPS interventions at low-income families—in effect, because of their lack of resources. *See* Virginia Eubanks, *A Child Abuse Prediction Model Fails Poor Families*, WIRED (Jan. 16, 2018), https://perma.cc/J75FBDUY; Dan Hurley, *Can an Algorithm Tell When Kids Are in Danger?*, N.Y. Times Mag. (Jan. 2, 2018), https://perma.cc/6YF6-QTZJ.

For the public to understand how government is operating through private-sector algorithmic systems—and whether such systems are infected by bias or inaccuracy—the public, and particularly researchers, need access to basic information that private companies provide to government. This will typically include:

- documents that reflect that an automated system has been acquired and is being used;
- documents that reflect the objectives, purposes, and design choices made by the company;
- documents that reflect how the autonomous system is embedded into a governmental decisional context;
- documents that describe how the autonomous system processes inputs to produce outputs; and

- validation studies and other reports reflecting efforts to audit a system's accuracy, fairness, and suitability for its proposed purpose.

Under the broad reading of Exemption 4 FMI seeks, private software developers could object to disclosure of all of these types of documents. This degree of secrecy could pave the way toward an era of automated governmental decisionmaking that is largely inscrutable and unaccountable: errors will go unfixed, bias undetected, and individuals will be unable to understand or challenge the processes to which they are subject.

B. Private companies supply technology that enables location tracking and other previously impossible forms of surveillance.

The government relies on private companies to provide powerful, cutting-edge investigative technology. Government agencies now have access to a growing variety of private surveillance technologies. For example, cell site simulators can pinpoint the location of cell phones, log calls, and sometimes even intercept the content of conversations. *See* Stephanie K. Pell & Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance and its Impact on National Security and Consumer Privacy*, 28 Harv. J. L. & Tech. 1 (2014). Computer hacking and surveillance software allows agencies to hijack and search computers, cell

phones, and myriad other internet-connected devices. *See* Privacy Int'l, *Government Hacking and Surveillance: 10 Necessary Safeguards* (2018), http://bit.ly/2Y8AYlv. Automated license plate readers track vehicle locations over months or years, creating a rich database of people's movements. *See* Elec. Frontier Found., *Automated License Plate Readers*, https://perma.cc/A797-Y6RV; Am. Civil Liberties Union, *You Are Being Tracked* (2013), https://perma.cc/B2R8-WYJN. Facial-recognition algorithms promise to automatically identify individuals in photos or videos, allowing police to track people in real time or to mine stored footage captured by CCTV cameras, and police body-worn cameras. *See, e.g.*, Garvie, *supra*. Social media data-mining tools allow government to amass, analyze, and assess large volumes of online speech and association from social networks. *See, e.g.*, Mohammad A. Tayebi & Uwe Glässer, Social Network Analysis in Predictive Policing 7–14 (2016); Brent Skorup, *Cops Scan Social Media to Help Assess Your 'Threat Rating'*, Reuters, Dec. 12, 2014, https://perma.cc/7BYY-WXXM.

These invasive technologies enable surveillance that has never before been possible and allow police access to "information otherwise unknowable." *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018). Sometimes these technologies are so complicated, very few at the government even fully understand their operation. Often the only way to learn about these technologies is through the information the vendor itself has provided to the government. That information could be sealed away from the public indefinitely if

FMI's subjective and essentially limitless reading of "confidential" is adopted.

a. One example of this powerful, private-sector surveillance technology are cell site simulators, also known as "Stingray" devices or "IMSI-catchers." *See State v. Andrews*, 134 A.3d 324 (Md. Ct. Spec. App. 2016); Cody Benway, *You Can Run, But You Can't Hide: Law Enforcement's Use Of "Stingray" Cell Phone Trackers and The Fourth Amendment*, 42 S. Ill. U. L.J. 261, 264 (2018); Pell & Soghoian, *supra*. These devices mimic cell-phone towers, forcing phones nearby to connect with them. Benway, *supra*, at 265. This allows for highly intrusive forms of surveillance. Stingrays sweep up data not just about a target's cell phone, but also bystanders' phones in the area. *Id.* Stingrays can triangulate and track the location of cell phones, determine all of the cell phones located within a specific area, and even track all of the connections that a cell phone makes with a network—collecting the numbers dialed and the data accessed. *Id.* at 265-66. Some versions of the technology are also capable of intercepting the actual content transmitted through a cell phone. *Id.* The technology is extremely accurate and sensitive, able to pin users within a few meters of their actual location. *Id.* at 266.

Companies have already sought to shroud even the most basic information about Stingrays under Exemption 4 and similar exemptions at the state level. In Arizona, the Harris Corporation, which manufactures many versions of these devices, asked the police to withhold even its pricing data about cell site simulator

equipment under Exemption 4, although that exemption was not ultimately litigated. *Hodai v. City of Tucson*, 365 P.3d 959 (Ariz. Ct. App. 2016); Complaint, Ex. B, *Hodai v. City of Tucson*, No. C20141225 (Ariz. Sup. Ct. Mar. 3, 2014), https://perma.cc/LE99-CPTE. Similarly, the Erie County Sheriff's Office in New York invoked trade secrets to withhold information about Stingrays. *See N.Y. Civil Liberties Union v. Erie Cty. Sheriff's Office*, No. 000206/2014, 15 N.Y.S.3d 713 (Sup. Ct. Mar. 17, 2015). Another New York court recently rejected the NYPD's argument that prices and features of its surveillance technology are trade secrets because there was no allegation of competitive harm or substantial injury from disclosure. *Millions March NYC v. N.Y. City Police Dep't*, No. 100690/2017 (Sup. Ct. Jan. 11, 2019), https://perma.cc/K7DR-M6XS.

Thus far, these efforts to withhold information about Stingrays under exemptions for commercial confidences have met only limited success—and have not had to be litigated—because the exemptions in question do not sweep nearly as broadly as FMI would like. But if FMI's broad and subjective standard prevails, what is now obviously subject to disclosure would become contested territory.

Indeed, FMI's definition of "confidential" would likely transform many successful FOIA requests about novel surveillance technologies into Exemption 4 denials. For example, in *ACLU of Northern California v. United States Department of Justice*, the government invoked a variety of FOIA exemptions, including the exemption for law enforcement techniques, to try to

prevent disclosure of information regarding cell phone based location tracking. 880 F.3d 473, 484 (9th Cir. 2018). In *Soghoian v. United States Department of Justice*, the government similarly resisted disclosure of certain information about internet and cell phone surveillance. 885 F. Supp. 2d 62, 65 (D.D.C. 2012). These cases have been litigated under exemptions that are more precisely tailored to the public interests actually at stake in such disputes, such as Exemption 7(E) for law enforcement "techniques and procedures." 5 U.S.C. § 552(b)(7)(E). But if Exemption 4 were expanded, the government could easily withhold all such information based solely on a company's private interests, so long as the records in question pertained to the company selling the equipment.

b. Automated License Plate Readers ("ALPR") are another example of powerful surveillance technology developed by private contractors before being sold or licensed to the government. ALPRs are camera systems which are generally mounted over roadways or attached to police squad cars. N.Y. State Div. of Criminal Justice Servs., *License Plate Reader Suggested Guidelines*, at 6 (Jan. 2011), https://perma.cc/EDL8-KPRF. From its perch above the road, an ALPR camera collects all of the license plate numbers it views, along with data on the location, date, and time, as well as photographs taken by the camera. *Id.* All of this information is uploaded to a central server. *Id.* at 7. In the aggregate, ALPR data can paint an intimate portrait of a driver's life, potentially identifying drivers who visit sensitive places such as health centers,

immigration clinics, gun shops, union halls, protests, or centers of religious worship. *See* Bryce Clayton Newell, *Local Law Enforcement Jumps on The Big Data Bandwagon: Automated License Plate Recognition Systems, Information Privacy, and Access to Government Information*, 66 Me. L. Rev. 397, 403-04, 413 (2014). Private companies do not simply supply ALPR hardware, they also sell government agencies access to massive databases that aggregate billions of individual location points from commercial and government ALPR devices. *See* Vigilant Solutions, *About*, https://perma.cc/Z8G8-67RA. Law enforcement can use this aggregated data to determine a vehicle's frequent destinations, its travel patterns, associated vehicles, and where the vehicle has been recorded in the past. Vigilant Solutions, *Car Detector—Mobile Hit Hunter*, https://perma.cc/ZT9B-LUY7.

As with other surveillance technologies, transparency is essential in order for the public to understand the government's capabilities and engage in meaningful democratic oversight. In Chicago, for example, a public records request about ALPRs successfully led to the disclosure of police training materials that provided basic instructions on using the ALPR and an outline of its powerful capabilities—including being able to "stake out" certain license plates and map out the vehicle's "frequent locations." Under FMI's subjective definition of "confidential," all such material could potentially be withheld at the whim of the vendor because it contains information about the capabilities of the technology it provides.

This is not idle speculation. The largest ALPR contractor, Vigilant Solutions, already includes language in its contracts prohibiting disclosure of "confidential information," which the company defines to include the data collected and generated by its ALPR readers. *See* Vigilant Solutions, *Software Program State and Local Law Enforcement Agency Agreement*, at 1, http://bit.ly/2W7QBb4. These contracts' broad terms could be interpreted to restrict disclosure of all kinds of information, including aggregated data showing just how invasive ALPRs can be. *See* Dave Maass & Jeremy Gillula, *What You Can Learn From Oakland's Raw ALPR Data*, EFF Deeplinks (Jan. 21, 2015), https://perma.cc/N9Z7-5NLA.

* * *

In other contexts, this Court has properly adopted legal interpretations that take into consideration the rapid development of technology. In a recent Fourth Amendment case, when considering cell phone location tracking technology, the Court was careful to "'take account of more sophisticated systems that are already in use or in development.'" *Carpenter*, 138 S. Ct. at 2218-19 (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)). Similar concerns favor a narrow interpretation of FOIA Exemption 4. In order to understand the capabilities of government surveillance technology and parameters within which it operates, the public must have access to basic documents, which will often be provided by or pertain to private vendors.

C. Private companies operate some of the federal government's most sensitive information infrastructure, including hosting cloud storage and providing official government credentials for veterans.

a. Private companies store and process a massive amount of federal data. Since 2011, when the White House instituted its "Cloud First" policy encouraging the use of cloud computing, private cloud storage has proliferated across the government. *See* Vivek Kundra, *White House Federal Cloud Computing Strategy*, 1-2 (Feb. 8, 2011). Microsoft, Google, IBM, Cisco, Blackberry, Adobe, Oracle, and Amazon Web Services, along with dozens of other companies, all supply cloud services to the federal government. FedRAMP, *Marketplace*, https://perma.cc/W7F5-YBMD. Amazon will likely also soon become the Department of Defense's sole cloud provider with one of the largest government IT contracts in history. Manna, *supra*, at 5.

Cloud computing provides remote access to shared file storage space, software applications, and systems processing on demand. Data is stored on servers all over the world. This can be much cheaper than traditional network or storage systems. The trade-off is that "data stored on cloud computing infrastructures is done outside of the control of the data owner—requiring a great deal of reliance on the Cloud Service Provider." Kevin McGillivray, *FedRAMP, Contracts, and the U.S. Federal Government's Move to Cloud Computing*, 17 Colum. Sci. & Tech. L. Rev. 336, 339 (2016).

The loss of control over data creates serious privacy concerns for government and governed alike. Significant aspects of cloud services are performed by third-party subcontractors, invisible to the contracting agency. *Id.* at 374. These third-parties are sometimes excluded from the terms of the contract between an agency and its prime contractor, leaving no service agreement in place and therefore no real control over data. *Id.* at 367. Such was the case with an EPA cloud contract in which the NDA did not flow from the prime to the subcontractor for lack of privity. *Id.* This rendered the agency unable to audit or seek damages from the subcontractor, leaving the EPA on the hook for $2.3 million in noncompliant or non-delivered services. *Id.* at 377-78.

Data stored in the cloud by other agencies may be vulnerable too. An audit by the Council of Inspectors General on Integrity and Efficiency concluded that the participating agencies had "not fully considered and implemented existing guidelines" and that "all [participant] contracts lack[ed] the detailed specifications recommended in Federal cloud computing guidelines." Council of the Inspectors General on Integrity and Efficiency, *Cloud Computing Initiative*, at 1 (Sept. 2014). The study found "none of the 19 participating agencies had adequate controls in place to manage its cloud service providers and the data that reside within its cloud." *Id.* at 2.

The public has a strong interest in understanding the government's reliance on private cloud providers. There are serious questions about the limits on the

collection and use of data by private companies; the vulnerability of sensitive data to hackers; safeguards in place to prevent misuse; and potential impacts on vulnerable populations. FOIA is the principal mechanism by which the public can make such inquiries. An expanded reading of Exemption 4 would inhibit or outright prevent this oversight.

b. Government agencies have also begun to entrust private companies with sensitive identity-verification and credentialing functions. For example, the Department of Veterans Affairs ("VA") has enlisted a private contractor to control access to a website, www.VA.gov, that allows veterans electronic access to medical records, lab results, and applications for disability and educational benefits, among other services. Veterans seeking to access their records through this government website are encouraged or required to register an account with a private company, ID.me, in order to gain access. *See* Dep't of Veterans Affairs, *Press Release* (Dec. 7, 2016), https://perma.cc/L68Z-8Y5E.

The government is also relying on the same private company to provide government-backed identification cards. In 2015, Congress required the VA to issue official ID cards proving veteran status. Veterans Identification Card Act of 2015, Pub. L. No. 114-31. VA has delegated the task of verifying identity to the private company. *See* Amy Bushatz, *Some Veterans Still Can't Apply for New ID Card*, Military.com (Apr. 2, 2018), https://perma.cc/BL8R-NFBM. Identity-verification is a core governmental function; outsourcing it to a private entity raises significant questions

about accuracy and fairness: could the private system inadvertently exclude individuals who are eligible, or improperly grant credentials to those who are not eligible? *Id.*

Outsourcing such functions also raises serious potential privacy concerns by blurring the distinction between governmental functions and private commercial interests. Highly sensitive data like social security numbers that are collected by private companies on behalf of the government may become subject to a company's ordinary privacy policy and data practices. Information provided in order to obtain government services may thus end up protected only by laws regulating the private sector.

Many of these concerns can only be addressed by reference to documents exchanged between private companies and government. If FOIA's Exemption 4 is given FMI's broad reading, citizens might be prevented from meaningfully overseeing systems that affect their daily lives and contain their most sensitive data.

III. Exemption 4 should be interpreted narrowly to ensure that the public can obtain critical information when the government relies on private companies.

FMI's interpretation of Exemption 4 would swallow up more precisely tailored laws meant to protect legitimate commercial interests. It would create disorder, broadening the exemption's scope to an unpredictable extent, depending on the whims of each vendor or

contractor. In so doing, it would shroud in secrecy core governmental functions aided by private companies, negating FOIA's core purpose.

The Court should thus maintain a strict, narrow interpretation of Exemption 4. Like other FOIA exemptions, Exemption 4 "must be narrowly construed." *Rose*, 425 U.S. at 361; *see also Milner*, 562 U.S. at 571; *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (interpreting Exemption 5 in accordance with "obligation to construe FOIA exemptions narrowly in favor of disclosure"); *FBI v. Abramson*, 456 U.S. at 630 (reaching a "result [that] is consistent with the oft-repeated caveat that FOIA exemptions are to be narrowly construed"); *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993) (construing Exemption 7(D) "narrowly in favor of disclosure").

At a minimum, the Court should maintain a definition of "confidential" that requires a showing of competitive harm. The Court should also clarify that the exemption's requirement that information be "obtained from a person" means the exemption cannot cover information that the government itself develops or produces, simply because it concerns a private company. These interpretations would maintain appropriate limits on Exemption 4's scope.

A. FMI's interpretation would render many carefully tailored confidentiality statutes superfluous, vastly expanding the secrecy of privatized governmental functions.

Exemption 4 should not be interpreted to render other statutory text redundant. It is a core principle of statutory interpretation that "every word and every provision is to be given effect." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Yet FMI's interpretation would render the portion of Exemption 4 concerned with "trade secrets" superfluous, because private companies could self-designate *any* information as "confidential," whether or not they constituted a "trade secret" within the meaning of the Act. 5 U.S.C. § 552(b)(4).

Likewise, Exemption 4 should be interpreted in a way that does not make other statutes enacted by Congress redundant. FMI's interpretation of the exemption would make superfluous a whole host of targeted commercial privacy rules that Congress has enacted to protect specific commercial secrecy interests in particular domains. *See, e.g.*, 10 U.S.C. § 130 (restricting disclosure of certain technical contractor data with military or space applications); 10 U.S.C. § 2305(g) (protecting military contractor proposals unless incorporated into contracts); 13 U.S.C. § 301(g) (prohibiting disclosure of shippers' export declarations); 15 U.S.C. § 1314(g) (prohibiting disclosure of answers and documentary materials given in antitrust investigations); 19 U.S.C. § 1677(f) (prohibiting disclosure of certain information submitted to the International Trade

Commission); 22 U.S.C. § 2778(e) (prohibiting disclosure of certain information submitted by export license applicants); 41 U.S.C. § 4702 (protecting non-military, executive-agency procurement proposals).

These statutes demonstrate that Congress did not understand Exemption 4 to sweep as broadly as FMI argues. And in a number of cases, courts have indeed made fine-grained rulings about whether particular information submitted by a private company falls within one of these statutes and is therefore exempt from FOIA under Exemption 3, 5 U.S.C. § 552(b)(3), which allows agencies to withhold information under certain confidentiality statutes. *See Hodes v. Dep't of the Treasury*, 967 F. Supp. 2d 369 (D.D.C. 2013) (finding some information not exempt under 41 U.S.C. § 4702); *Durrani v. United States Dep't of Justice*, 607 F. Supp. 2d 77 (D.D.C. 2009) (finding some information not exempt under 22 U.S.C. § 2778(e)); *Africa Fund v. Mosbacher*, No. 92-cv-289, 1993 U.S. Dist. LEXIS 7044 (S.D.N.Y. May 26, 1993) (same); *Council for a Liveable World Educ. Fund v. Dep't of State*, No. 96-cv-1807, 1998 U.S. Dist. LEXIS 23642 (D.D.C. Jan. 22, 1998) (construing 22 U.S.C. § 2778(e) narrowly).

Even in the specific context of this case, which concerns financial information regarding retailers and wholesalers who participate in SNAP, Congress has passed a specific statute protecting certain specific information against disclosure. 7 U.S.C. § 2018(c); *see Argus Leader Media v. USDA*, 740 F.3d 1172 (8th Cir. 2014).

All of these statutes would be rendered superfluous and irrelevant if Exemption 4 were interpreted to encompass anything a private company has not made public and prefers not to disclose. By enacting this panoply of context-specific confidentiality statutes, Congress demonstrated that it did not understand or intend Exemption 4 to sweep nearly that far.

B. FMI's interpretation would establish a subjective standard for secrecy and would result in haphazard, unpredictable, and unprincipled disclosure when government operations happen to involve private companies.

FMI's reading expands Exemption 4 to an unknowable and necessarily subjective extent. Under FMI's proposed test, each company would decide for itself what should be regarded as confidential. This kind of subjective test would leave the public unaware of what is happening in certain parts of our government, and unsure of what types of records, if any, are accessible.

Congress recently amended FOIA to make clear that exemptions must be given an objective, predictable scope. The FOIA Improvement Act of 2016 added language confirming that tests for exemptions should be objective, not subjective: "An agency shall withhold information under this section only if the agency *reasonably foresees* that disclosure would harm an interest protected by an exemption." 5 U.S.C.

§ 552(a)(8)(A)(i)(I) (emphasis added). Reasonable foreseeability is classic objective language and its use indicates that a subjective test is inconsistent with the statute itself. *See, e.g.*, *Kentucky v. King*, 563 U.S. 452 (2011) ("Legal tests based on reasonableness are generally objective."); *United States v. Wymer*, 654 Fed. Appx. 735, 754 (6th Cir. 2016) ("[R]easonable foreseeability is an objective test."); *United States v. Muni*, 668 F.2d 87, 90 (2d Cir. 1981).

The subjective reading FMI urges would swallow up FOIA whole where the government relies on contractors to deliver services or where private technology and equipment is central to government programs. If private companies are free to deem as secret information about their services that they have already shared with the government, the public will frequently be left in the dark about government activities.

C. Exemption 4 should be interpreted to include only records actually "obtained from" a private company, and not records that merely concern a private company.

Exemption 4's protection for commercial information is limited to information that is both "confidential" and, importantly, "obtained from a person." 5 U.S.C. § 552(b)(4). The Court should clarify that the latter phrase, too, imposes a meaningful limit on the scope of the exemption. In particular, the Court should clarify that the exemption covers only information that

a private contractor provides directly to the government, and does not cover the government's own records or information that the government itself develops, even if it concerns the private company or would reveal information about the company's operations, products, or services. This interpretation would make clear that any information the government itself generates about its contractors and vendors—for example, audits, assessments, evaluations, financial summaries, records of payments, purchase prices, contracts, etc.—would remain subject to disclosure unless covered by another, more precisely-tailored exemption.

The Second Circuit has examined the "obtained from a person" requirement carefully and persuasively in *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010). In that case, the court considered a FOIA request for details about loans granted by the Federal Reserve to commercial banks in the aftermath of the financial crisis. *Id.* at 145-46. The court distinguished between completed bank loan applications (which would be records "obtained from" the borrower) and the terms of the loans actually awarded by the Federal Reserve (which were the agency's own information generated upon the decision to grant a loan). *Id.* at 148.

The court observed, more generally, that records generated by the government or within the agency cannot be subject to Exemption 4. *Id.* (citing *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403-04 (D.C. Cir. 1980) and *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006)). This is true, the

court explained, even when information created by the agency could disclose information about the private entity: "The fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA." *Id.* (emphases in original).[3]

The records sought by Argus Leader in this case illustrate the danger of ignoring the phrase "obtained from a person" in the exemption. Argus Leader seeks records about private companies—grocery stores—that are an integral part of delivering an important governmental service, namely food aid. But Argus Leader does not seek any proprietary information that the grocery stores themselves provided to the government, or which the government demanded from them. Instead, Argus Leader seeks records that *the government itself* has created in order to administer the program. Like the loan amounts at issue in *Bloomberg L.P.*, records showing the amount of money paid out to grocery stores by the government are not records "obtained from a person" but instead generated by the government.

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[3] This line of reasoning has surfaced periodically nearly since FOIA's inception. For example, in *Fisher v. Renegotiation Board*, 355 F. Supp. 1171 (D.D.C. 1973), the court held that Exemption 4 did not cover records from a federal board charged with eliminating excessive profits on defense contracts. *Id.* at 1173. The court found that records showing the amounts of excess profits were the board's own calculations and thus not "obtained from a person," even though they were based directly on figures obtained from the contractors. *Id.* at 1174.

In particular, the records requested by Argus Leader reside in the USDA's own Food and Nutrition Services Store Tracking Redemption System database. Br. of Resp. at 4. These are the government's own records. The fact that they *concern* a private company does not mean that they were "obtained from" that company. *Cf. Bloomberg L.P.*, 601 F.3d at 148. Indeed, arguing that such figures belong to the grocery stores and are not the government's own data is akin to arguing that one's own checkbook register is not one's own data but rather information "obtained from" the stores with which one has transacted. Just as one's own record of payments cannot be said to be a private company's records simply because they reveal information about that company, information developed by the government cannot be said to be "obtained from" a private company simply because it would reveal something about the private company.

The Court should thus clarify that the phrase, "obtained from a person," means that the exemption covers only records that the government actually receives directly from a person or company. Consistent with the Court's unbroken line of cases requiring that exemptions be construed narrowly, the exemption cannot be read to cover records that the government creates itself, even if they concern the company.

CONCLUSION

Amici urge the Court to reject FMI's broad and subjective interpretation of Exemption 4. Instead, the

Court should give Exemption 4 a narrow construction, holding that information is covered only if the records in question were actually "obtained from" a private company and disclosure would actually cause competitive harm, such that the records can properly be considered "confidential" in nature.

Respectfully submitted,

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March 25, 2019

APPENDIX

The AI Now Institute at New York University ("AI Now") is an interdisciplinary research center dedicated to understanding the social implications of artificial intelligence. As artificial intelligence and related technologies are used to make determinations and predictions in high stakes domains such as criminal justice, law enforcement, housing, hiring, and education, they will affect basic rights and liberties in profound ways. AI Now produces original research and acts as a hub for the field focused on these issues. Public records requests comprise an important source of information for AI Now.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. Documents obtained through Freedom of Information Act requests are often critical in shaping the ACLU's response on a range of important civil liberties issues.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. With over 36,000 active donors and dues-paying members, EFF represents the interests of technology users in court cases and broader policy debates surrounding the application of law in the digital age. EFF regularly

files Freedom of Information Act requests with federal agencies to understand government surveillance, including partnerships between law enforcement and private companies.

The Center on Race, Inequality, and the Law at New York University School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Accordingly, the Center uses public education, research, advocacy, and litigation to highlight and dismantle structures and institutions that have been infected by racial bias and plagued by inequality. The Center focuses, in part, on the intersection of race, bias, the criminal legal system, and other governmental systems in which technology plays a salient role in shaping the exercise of discretion by institutional actors. Public records requests are critical to the Center's work.

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. The Institute regularly relies on the Freedom of Information Act to promote government accountability.

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA D/B/A ARGUS LEADER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, AMERICAN FARM BUREAU FEDERATION, ANIMAL AGRICULTURE ALLIANCE, FUR INFORMATION COUNCIL OF AMERICA, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, PET INDUSTRY JOINT ADVISORY COUNCIL, PINNACLE PET, PROTECT THE HARVEST, THE UNITED STATES ASSOCIATION OF REPTILE KEEPERS, AND THE ZOOLOGICAL ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the Court restore the word "confidential" in Exemption 4 of the Freedom Information Act, 5 U.S.C. § 552(b)(4), to its plain meaning, or should it affirm the atextual meanings provided to it by the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983)?

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INTEREST OF *AMICI CURIAE*[1]

Amici are national businesses, associations and organizations whose members and stakeholders work with and care for animals in their respective businesses, vocations, industries and fields. As such, *amici* and their members and stakeholders regularly provide information, on both a required and a voluntary basis, to various federal agencies that regulate animal and wildlife use, care and maintenance. This case is important to *amici* because they and their members have been, and will continue to be, subjected to negative financial and reputational consequences as a result of the government's release of their confidential information due to the D.C. Circuit's atextual interpretation of the word "confidential" in Exemption 4 of the Freedom of Information Act, which courts around the country have adopted.

The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine

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1. Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

mammal conservation through public display, education, research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild.

The American Farm Bureau Federation ("AFBF"), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to represent its members.

The Animal Agriculture Alliance is a 501(c)(3) industry-united nonprofit organization that connects food industry stakeholders; engages with food chain influencers; promotes consumer choice by helping people better understand modern animal agriculture; and protects the future of animal agriculture. Its members include farmers, ranchers, food companies, feed and animal nutrition companies, veterinarians, animal scientists, agricultural associations and other allied stakeholders.

The Fur Information Council of America ("FICA") is a not-for-profit organization that protects and promotes the interests of the U.S. fur industry. While its more than 100 members include some of the nation's largest fur retailers, manufacturers, wholesalers, fashion designers, auction houses, and other U.S. exporters of furbearing skins and products, approximately 85% of FICA's members

are small, family-run businesses. FICA provides the public with information on the fur industry, wildlife conservation and responsible animal care to which the fur industry is committed. Part of FICA's mission is to protect the interests of the U.S. fur industry by providing its membership with support to counter distortions and misrepresentations made by anti-animal use groups.

The National Association for Biomedical Research ("NABR") is a 501(c)(6) nonprofit association dedicated to sound public policy for the humane use of animals in biomedical research, education and testing. NABR has 330 member organizations, including pharmaceutical companies, biotechnology companies, universities, medical schools and other life science organizations engaged in or having a stake in humane animal research.

The Pet Industry Joint Advisory Council is a 501(c)(6) nonprofit dedicated to promoting responsible pet ownership and animal welfare, fostering environmental stewardship and ensuring the availability of pets.

Pinnacle Pet is a national pet supplier. Dedicated to pet wellness, Pinnacle Pet provides customized care of its animals from breeder to pet store.

Protect the Harvest is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

The United States Association of Reptile Keepers ("USARK") is a registered 501(c)(6) nonprofit membership organization representing reptile breeders, hobbyists,

conservationists, academics, pet owners, scientists, and businesses that provide the reptile community with equipment, feed, transportation, and specialized veterinary and other services. USARK is an education, conservation and advocacy organization for herpetofauna promoting awareness, responsible care, and professional unity for all manners of reptile species. As part of this mission, the organization supports responsible private ownership of, and trade in, reptiles and amphibians, as well as promulgates and endorses responsible caging standards, sound husbandry, escape prevention protocols, and an integrated approach to vital conservation issues.

The Zoological Association of America ("ZAA") has more than 60 accredited members, with accreditation predicated on the promotion of the highest standards of animal welfare as well as public and staff safety. ZAA's work includes animal ambassador programs, classroom education and, with wildlife management professionals around the globe, the conduct and support of research in behavioral sciences and genetics and the exchange of information and training on husbandry, nutrition, best management practices and veterinary care.

SUMMARY OF THE ARGUMENT

"Confidential information" has a plain meaning: "Knowledge or facts not in the public domain but known to some . . . ." Black's Law Dictionary 361 (10th Ed. 2014). That is what the term means wherever it is not defined otherwise, including in the Freedom of Information Act ("FOIA")'s Exemption 4, 5 U.S.C. § 552(b)(4). Exemption 4 exempts from mandatory FOIA disclosure materials that are "trade secrets and commercial or financial information

obtained from a person and privileged or confidential." Pursuant to the plain meaning of "confidential," application of Exemption 4 to "confidential" material of a "commercial or financial" nature should be determined simply by the declaration of the party whose confidential information is at issue that the information has been kept confidential and not released by that party into the public domain. Such information should then be disclosed only if the requester can demonstrate otherwise.

Yet, despite the plain language of the statute and the clear meaning of the word, the D.C. Circuit, in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), created an atextual "substantial competitive harm" test out of whole cloth that heightened the standard by which commercial and financial materials would be considered confidential for purposes of applying Exemption 4. Later, in *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280 (D.C. Cir. 1983), the D.C. Circuit added one caveat to its test that disallowed reputational harm as a basis to establish competitive harm, and another that further limited application of Exemption 4 only to harm flowing from the affirmative use of proprietary information specifically by "competitors." These heightened *Public Citizen* standards had no basis in the text of FOIA or in its legislative history. Instead, the D.C. Circuit's source for this new interpretation of Exemption 4 was a citation-free paragraph in a University of Wisconsin Law Review article.

The results of the D.C. Circuit's atextual and unsupported precedents have been incredibly damaging to *amici*, their members and similarly situated entities.

Activist groups opposed to *amici* rely on *National Parks* and *Public Citizen* to obtain *amici*'s confidential information from the government. They then go on to misuse and publicly disseminate that confidential information in attempts to drive *amici* and their members out of business, by causing them reputational and economic harm.

Additionally, the misinterpretation of Exemption 4 by *National Parks* and *Public Citizen* – and other Circuits following their precedent – has fostered costly and prolonged FOIA lawsuits, often leading to patently unjust outcomes, with the disclosures of plainly confidential commercial information. The misinterpretation has also promoted the multiplicity of parallel lawsuits in different jurisdictions to obtain the same confidential information of private parties pursuant to FOIA.

The exploitation of FOIA in this manner, and the resulting explosion of FOIA requests by activist groups, can and should be remedied by this Court. The Court should take this opportunity to overrule *National Parks* and *Public Citizen* once and for all. The government and the lower courts should be instructed to apply the plain meaning of confidential in Exemption 4. Such a move would ensure that FOIA will no longer be used as a weapon in the hands of those who wish to cause harm by wrongfully receiving confidential commercial and financial information of private persons.

ARGUMENT

I. THE WORD "CONFIDENTIAL" MEANS "CONFIDENTIAL"

5 U.S.C. § 552(b)(4) ("Exemption 4") exempts from mandatory disclosure under the Freedom of Information Act ("FOIA") materials that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The word "confidential" in this sentence is not defined. It need not be. "Confidential" means "confidential."

Despite the plain language of Exemption 4, the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) chose to create an atextual test, defining the term "confidential" as requiring the government to prove that providing the information under FOIA likely would result in "substantial competitive harm." *See* Pet. Brief, at 3.[2] Notwithstanding *National Parks* and its widespread adoption by other Circuit Courts, the word "confidential" does not mean "confidential but only if disclosure likely results in substantial competitive harm" – not in Exemption 4, nor anywhere else.

National Parks creates an entirely atextual burden on private parties who seek nothing more than to protect their own confidential information. It similarly burdens the government agencies usually tasked with trying to

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2. The D.C. Circuit's Exemption 4 test applies only *sometimes*, *i.e.*, when the material was compulsorily provided to the government, as opposed to when it was voluntarily provided. *See* Pet. Brief, at 14.

protect this third-party information. In rejecting the lower courts' *National Park* precedent, this Court need not look beyond the statute's plain text.

Should this Court agree with Petitioner Food Marketing Institute ("Petitioner" or "FMI") and *amici* that the word "confidential" means what it says, the inevitable question for the Court to decide will likely become: post-*National Parks*, how will the government, or a party whose confidential information is being requested pursuant to FOIA, demonstrate that confidential material is, in fact, confidential?

Amici submit that the answer is straightforward. Confidential materials are those that a party treats as confidential in its regular course of business and does not release to the public – *for whatever reason*. "Confidential information" has a plain, unambiguous meaning: "Knowledge or facts not in the public domain but known to some . . . ." Black's Law Dictionary 361 (10th Ed. 2014). Thus, if the material is treated by the submitting party as private, and has not been disclosed by the party to the public, it should be considered "confidential" for Exemption 4 purposes. Proof of the confidential nature of the material at issue should be established by way of declaration(s) from the party who provided the commercial information to the government, whether voluntarily or through government mandate, or from whom the information was obtained by the government in the course of its own inspections of a party's facility or by way of communications between the private party and the government. The burden then should shift to the party requesting the information under FOIA to prove that the confidential information is not, in fact, confidential.

This proposed test is simple and straightforward. Indeed, it is similar to a standard used to protect confidential information in trial courts by way of a protective order. In both instances, the parties are expected to mark materials as confidential only when they truly are so. If a document marked confidential was previously disseminated within the public domain, the opposing party has the ability to challenge the designation by demonstrating that the information was not kept private.[3]

Most importantly, *amici's* proposed test does not ignore the plain language of Exemption 4. This alone makes it more palatable to an appropriate application of FOIA than the current "substantial competitive harm" test prevalent among the lower courts.

II. THE COURT SHOULD ENSURE THAT THE LEGACY OF *NATIONAL PARKS* IS OVERRULED

A. The Court Should Overrule the D.C. Circuit's Law Review-Inspired Precedent of *Public Citizen Health Research Group*

Amici urge the Court not only to overrule *National Parks* but to ensure that its progeny, including *Public Citizen Health Research Group v. Food & Drug*

3. For the purpose of this test, any materials previously released under FOIA pursuant to the old *National Parks* test should not be considered in the public domain. For example, if a category of information was released pursuant to *National Parks* in the past and is now in the public domain, any update to that information should not be released under a post-*National Parks* test.

Administration, 704 F.2d 1280 (D.C. Cir. 1983), is laid to rest. In a footnote near the end of its opinion in *Public Citizen*, the D.C. Circuit

> emphasize[d] that "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."

704 F.2d at 1291 n. 30 (emphasis in original). The quoted language comes from a University of Wisconsin Law Review article by Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*. *See* 1981 Wis. L. Rev. 207, 235-36 (hereinafter, "*Secrets and Smokescreens*"). Grounded on nothing more than the conjecture of the article's author for this "important point for competitive harm in the FOIA context" which *Public Citizen* embraced without any reference to case law, legislative history or analysis, *Secrets and Smokescreens* effectively established two new requirements for information to qualify as "confidential" under Exemption 4.

First, *Secrets and Smokescreens* posited that for information to be "confidential" under Exemption 4, the harm must "flow[] from the affirmative use of [the]

proprietary information by *competitors*." *Secrets and Smokescreens* at 235 (emphasis in original) (citing nothing). Second, the article summarily concluded that reputational harm of the party whose information would be disclosed does not count in the Exemption 4 "confidential" analysis, stating that competitive harm cannot "flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Secrets and Smokescreens* at 235 (citing nothing).[4]

Nothing in the legislative history of FOIA – even in any of the attenuated legislative history relied on by the D.C. Circuit – required or implied that the limitations imposed by the author of *Secrets and Smokescreens* should be applied to Exemption 4.[5] Yet, *Public Citizen*, relying on

4. As to *Secrets and Smokescreens*' unilateral exclusion of reputational harm from the Exemption 4 analysis, one critic has noted: "The author cites no cases or authority for this statement, nor does he provide any data or reference to social-science research on reputational effects. There is no other context given to his assertion of what competitive harm does or does not include. And yet it is this quote to which the D.C. Circuit [in *Public Citizen*] refers two years later in what has become a widely-cited – if purely dicta – comment regarding reputational harm." Kathleen Vermazen Radez, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 Colum. Bus. L. Rev. 632, 658 (2010) (citations omitted).

5. Indeed, "[b]oth the House and Senate reports on the FOIA bills provide that [Exemption 4] is intended to protect information which customarily would not be released to the public by the person from whom it was maintained. It seems clear that Congress intended Exemption 4 to maintain the status quo: business information which industry customarily held in confidence would continue to be exempt from mandatory disclosure

nothing other than *Secrets and Smokescreens*, imposed those restrictions. *National Parks* at least purported to rely on legislative history in expanding the statutory language. *See* Pet. Brief, at 24-26. *Public Citizen* did no such thing. Instead, in *Public Citizen* the D.C. Circuit radically expanded its already atextual definition of "confidential" based on a single academic's assumptions.[6]

Since *Public Citizen*, even courts outside the D.C. Circuit have applied the "law" of *Secrets and Smokescreens* without analyzing from where or how that "law" came to be. For example, in *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189 (9th Cir. 2011), the Ninth Circuit took *Secrets and Smokescreens*, quoted without reservation by *Public Citizen*, as settled law. *See* 643

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under FOIA." Thomas L. Patten and Kenneth W. Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 197 (1977) (citations to House and Senate Reports omitted) (hereinafter, "Patten and Weinstein").

6. *Amici* recognize that members of the Court have expressed differences of opinion as to the utility of legislative history in the subsequent interpretation of a statute. *Compare Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (J. Sotomayor, concurring) (2018) ("Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law."), *with id.* at 783-84 (J. Thomas, concurring in part and in the judgment) ("I join the Court's opinion only to the extent it relies on the text of the Dodd–Frank Wall Street Reform and Consumer Protection Act . . . I am unable to join the portions of the Court's opinion that venture beyond the statutory text."). In this case, where both the statute itself and its legislative history were ignored in the D.C. Circuit's interpretation of Exemption 4, all of the Court's members should be comfortable overruling *Public Citizen*'s law review-inspired precedent.

F.3d at 1195 ("Competitive harm analysis 'is . . . limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position . . . .'") (quoting *Public Citizen*, 704 F.2d 1280, 1291 n. 30). Since *Watkins*, courts throughout the Ninth Circuit have referenced and relied on *Secrets and Smokescreens* in granting overbroad FOIA requests that a plain reading of Exemption 4 would have rejected. *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. CV-16-00527-TUC-BGM, 2018 WL 1586648, at *4 n. 2 (D. Ariz. Mar. 30, 2018); *Edelman v. U.S. Sec. & Exch. Comm'n*, No. 315CV02750BENBGS, 2017 WL 4286939, at *6 (S.D. Cal. Sept. 27, 2017); *AIDS Healthcare Found. v. U.S. Food & Drug Admin.*, No. CV1107925MMMJEMX, 2014 WL 10983763, at *6 (C.D. Cal. Feb. 13, 2014).

In fact, the district court below in *this* case relied on the definition of "competitive harm" invented by *Secrets and Smokescreens*. The district court held: "Competitive harm is limited to 'harm flowing from the use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations.'" *Argus Leader Media v. U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (quoting *Public Citizen*, 704 F.2d at 1291 n. 30). This case, therefore, presents a prime opportunity not only to overrule the Exemption 4 test of *National Parks*, but also to do away with the reputational harm test contained in *Public Citizen*.

B. Reputational Harm Causes Real Damage

Under the current *National Parks* and *Public Citizen* tests, Exemption 4 provides *amici*'s confidential information with scarce protection. *Amici*'s detractors[7] often proudly and loudly announce that the goal of their receipt of the confidential materials of *amici* is to reputationally embarrass and economically harm them and their suppliers and vendors.[8] Nevertheless, applying *National Parks* and *Public Citizen*, lower courts regularly find that *amici*'s confidential materials *may* be publicly disclosed, either because *amici*'s detractors are not "competitors" of *amici*, or because reputational harm is not protected by Exemption 4.

One case in point of reputational harm causing real damage is demonstrated by the testimony presented in 2018 by Dr. Rae Stone, who testified on behalf of *amicus* AMMPA before the Senate Subcommittee on Oceans Atmosphere, Fisheries, and Coast Guard. *See Enhancing the Marine Mammal Protection Act: Before the Subcomm. on Oceans, Atmosphere, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation*, 115th Cong., p. 6 (April 25, 2018)

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7. These detractors include organizations such as People for the Ethical Treatment of Animals ("PETA"), the Center for Biological Diversity ("CBD"), the Animal Legal Defense Fund ("ALDF"), the Humane Society of the United States ("HSUS") and like-minded groups.

8. *See, e.g., Stop Air France From Shipping Monkeys to Their Deaths!*, https://headlines.peta.org/air-france-stop-shipping-monkeys/ ("Air France even canceled an individual shipment of monkeys after a public outcry by PETA and its supporters.").

(statement of Rae Stone, President & Partner, Dolphin Quest), https://www.commerce.senate.gov/public/index.cfm/2018/4/enhancing-the-marine-mammal-protection-act ("Stone Testimony"). Dr. Stone testified about confidential information required to be submitted by AMMPA members to the National Marine Fisheries Service ("NMFS") for its marine mammal inventory maintained pursuant to the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361, *et seq.*

The MMPA requires that NMFS maintain in the inventory, among other things, "[t]he name of the marine mammal or other identification . . . [t]he estimated or actual birth date of the marine mammal . . . [and the] date of death of the marine mammal and the cause of death when determined." 16 U.S.C. § 1374(c)(10)(A), (B), (H). This confidential commercial information is routinely sought by activists under FOIA. The activists use the FOIA information in order to promote and often exaggerate the deaths of animals in zoos, marine mammal parks and similar facilities and "unambiguously say their goal is to end the use of animals in zoological facilities, agriculture, and other sectors." *See* Stone Testimony, p. 6. Notwithstanding these threats, the D.C. Circuit's "competitors" test means this confidential information that *amici* are required to turn over to the government is provided no protection under *Public Citizen*'s Exemption 4 standard.

Further, the NMFS inventory "information" the activists obtain often is inaccurate, and is used by them to promote further inaccuracies and to cause *amici* reputational (and, thereby, economic) harm. For example, detractors of marine mammal park Dolphin Quest used

FOIA to receive confidential information about Dolphin Quest, and then misused that confidential information to make false claims about the facility. As Dr. Stone observed:

> A committee [in the Hawaii legislature] was considering legislation that sought to ban the transfer of cetaceans in human care "for breeding or entertainment purposes." Not only did animal extremists supporting this bill say they used "research" gleaned from the NMFS inventory to support this legislation, the bill sponsors included inaccuracies from the NMFS inventory in the actual bill text. *The information about Dolphin Quest from the inventory that was the basis of this "research" was grossly inaccurate and referenced animals that were never at Dolphin Quest and died before Dolphin Quest was even founded.*

Stone Testimony, p. 6 (emphasis added).

III. THE CURRENT EXEMPTION 4 TEST OFTEN LEADS TO PROLONGED LITIGATION AND ABSURD RESULTS

The confidential information *amici*'s detractors seek often includes: (1) the numbers and locations of animals and animal products kept in the regular course of business,[9] (2) the total number of animals purchased and sold, and the gross revenues of those sales,[10] and (3)

9. *See infra*, Section III.A.

10. *See infra*, Section III.B.

information regarding the import and export of animals.[11] All the above categories of confidential materials have been publicly disclosed pursuant to *National Parks* and *Public Citizen*, despite their being of a "commercial or financial" nature, and thus covered by a plain language reading of Exemption 4.

What is more, the government, and/or private persons (such as *amici*) who wish to protect this information from disclosure, must spend time and money in protracted FOIA litigation that under the current prevalent precedents, *amici* and the government regularly lose despite the confidentiality of the documents and materials at issue. The following are but two examples of years-long cases in which *amici*, their members and similarly situated entities were harmed – and continue to be harmed – by the current Exemption 4 test which failed to protect their private, confidential commercial information against public dissemination.

A. *Animal Legal Defense Fund v. U.S. Food & Drug Administration*

In 2012, the Animal Legal Defense Fund ("ALDF") filed suit against the U.S. Food & Drug Administration (the "FDA"). ALDF argued that the FDA wrongly relied on Exemption 4 to prevent the release of confidential materials "related to egg production in Texas." *See Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, Case No. 12-cv-04376-EDL (N.D. Cal., filed August 20, 2012) (the "ALDF Case"), Complaint, ECF No. 1, p. 1. Those confidential materials were provided to the FDA by persons and companies who worked in the egg industry. *Id.*

11. *See infra*, Section IV.

Basing their protection under Exemption 4, the FDA refused to release the following five categories of information: "(1) total hen population; (2) total number of hen houses; (3) total number of floors per hen house; (4) total number of cage rows per hen house; and (5) total number of cage tiers per hen house." ALDF Case, Magistrate Judge's Findings of Fact & Conclusions of Law, ECF No. 169, p. 1 ("ALDF Opinion"). All this information was received by the FDA from private parties. *Id.* And, there was "no dispute that the information that the FDA redacted . . . is 'commercial or financial information' that may be protected from disclosure if Exemption 4 otherwise applies." *Id.* at 13.

Nevertheless, the FDA was forced to spend nearly eight years litigating what should have been – pursuant to a plain reading of Exemption 4 – a very simple case, and which, under a plain reading of the statute, would almost certainly have resulted in summary dismissal. As it was, after years of motion practice, and multiple pre-trial appeals and remands, the magistrate assigned to the case held a four-day bench trial in April 2018 on the issue whether the confidential commercial materials ALDF requested should be considered "confidential" under Exemption 4.

On January 23, 2019, the magistrate issued its Findings of Fact and Conclusions of Law. *See* ALDF Opinion. In its findings, the magistrate concluded that Exemption 4 did not apply to the majority of the withheld information, despite the fact that the private parties that provided the commercial information to the FDA themselves treated the information as confidential – similar to the case at bar.

Following the reasoning of *National Parks* and *Public Citizen*, the magistrate held that "no likelihood of substantial competitive harm arises from the release of the total number of hen houses, total number of floors per hen house, total number of cage rows per hen house, and the total number of cage tiers per hen house." ALDF Opinion, p. 2. In so doing, the magistrate specifically relied on *Public Citizen*, 704 F.2d at 1291 n. 30, as adopted by the Ninth Circuit in *Watkins*, 643 F.3d at 1195, for the proposition that "Competitive harm analysis 'is limited . . . to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position." ALDF Opinion at 13 (emphasis in ALDF Opinion). Forty years of misguided D.C. Circuit precedent should not blind this Court to the absurdity of this result.[12]

The sheer length of the ALDF Case, which has been ongoing since 2012 and may continue for some time longer, is by no means uncommon in a FOIA litigation. Such undue burden in time and expense to the government in attempting to prove "substantial competitive harm" provides the Court with another consideration for returning "confidential" to its plain meaning. The government should not be forced to focus its resources in order to prove whether an admittedly confidential item would cause "substantial competitive harm" if publicly released. Instead, if the test was based on a plain language reading of the term confidential, the

12. As of the date of this filing, the judgment in the ALDF Case is stayed pending FDA's receipt of approval from the Solicitor General to appeal the case to the Ninth Circuit. *See* ALDF Case, ECF No. 172.

government would easily be able to discern whether the commercial or financial material at issue was truly treated by the submitting party as confidential. All that would be necessary would be the submission of declarations to that effect.

B. *Jurewicz v. U.S. Department of Agriculture*

In the ALDF Case, the magistrate held that the "use of disclosed information by an individual who is not a competitor does not implicate Exemption 4." ALDF Opinion at 13. In doing so, the magistrate relied on *Jurewicz v. United States Department of Agriculture*, 741 F.3d 1326 (D.C. Cir. 2014). *Jurewicz* stemmed from FOIA requests made by an animal activist group, the Humane Society of the United States ("HSUS") in 2009. *Id.* at 1330. HSUS was looking to obtain confidential information "relating to the[] gross revenue and business volume" of certain dog breeders and dealers in Missouri. *Id.* at 1329. Particularly, HSUS wanted "copies of Form 7003s" submitted to the U.S. Department of Agriculture's Animal and Plant Inspection Service ("APHIS"). *Id.* "Form 7003 asks for (1) the total number of animals purchased and sold in the last year; (2) the gross revenue from regulated activities; and (3) for dealers that are not breeders, the difference between the purchase price and sale price of the animals sold." *Id.* This confidential information is provided by dog breeders and dealers to APHIS on a yearly basis, pursuant to 7 U.S.C. § 2134 and 9 C.F.R. § 2.5(b).[13]

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13. APHIS's Form 7003 is found at the following link: https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_Regulated_Businesses/SA_Request_License_Registration_Application_Kit.

A group of the breeders and dealers whose records were set to be released challenged the release in federal court in this reverse-FOIA case. They alleged, among other things, that their commercial information found on Form 7003 should be protected from disclosure under Exemption 4. The D.C. Circuit rejected the challenge. Following *National Parks* and *Public Citizen*, the D.C. Circuit held that the challengers needed to "show[] both actual competition and a likelihood of substantial competitive injury." *Id.* at 1331. "Exemption 4," the *Jurewicz* court held, "does not guard against mere embarrassment in the marketplace or reputational injury" and "must flow from the affirmative use of proprietary information by competitors." *Id.* (quotations omitted).

It is inconceivable that a small business's total sales and gross revenues would not be considered confidential commercial and financial information. Yet, to the *Jurewicz* court's mind, these facts were of no moment. Instead, the only thing that mattered was whether the law review-inspired test of *Secrets and Smokescreens* was met. Because it was not, the information was released after five years of litigation.[14] This illogical and inequitable result

14. Another consideration for returning "confidential" to its plain meaning in Exemption 4, is the undue burden in time and expense to submitters in attempting to prove "substantial competitive harm" versus being able to make a simple showing that their confidential information is not normally made publicly available by them. *See* Patten and Weinstein at 200 (proof of competitive harm "obviously would be difficult and costly to present"). Activist groups are, on the whole, much better-funded than the many small business members of *amici*. The latter do not have the same resources to protect their confidential information from disclosure, as compared to their detractors

is inconsistent with the text of Exemption 4 and should not be allowed to be repeated in the future by continued application of the *National Parks* and *Public Citizen* tests.

IV. WITH NO UNIFORM UNDERSTANDING OF "CONFIDENTIAL," MANY LAWSUITS ARE OFTEN FILED IN DIFFERENT CIRCUITS IN ORDER TO RETRIEVE THE SAME CONFIDENTIAL INFORMATION

Because the interpretation of the word "confidential" in Exemption 4 has not been definitively ruled on by this Court, parallel – indeed, often virtually identical – court proceedings involving FOIA requests for substantially the same information will have potentially conflicting outcomes. Gamesmanship is the primary likely reason multiple lawsuits are filed by closely aligned and related activist groups in different Circuits in order to retrieve the *same* confidential information of the *same* private parties. Plaintiffs using FOIA to obtain documents of private parties know that at least *some* district courts and Circuits will likely follow the D.C. Circuit's wide-ranging precedent in *National Parks* and *Public Citizen* – and will thereby ignore the actual confidential nature of the materials being FOIA'd.

Even if those parties lose in one Circuit, if they win in another the first loss will not matter. If even one Circuit retains the D.C. Circuit's expansive tests as to what

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who seek such information under FOIA. *Cf. Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (expressing concern about "plaintiffs' attempt, assisted as it is by at least five of such [animal-rights] organizations, as evidenced by their corporate-level-counsel amici briefs . . . to close small, privately owned zoos.").

"confidential" information is, the defendants will lose, as the materials being sought will simply be FOIA'd from that jurisdiction. This Court has the power to remedy this injustice, and to stop once and for all this gamesmanship. Only a uniform test of what the term "confidential" means and how it is applied in Exemption 4 can prevent such abuse.

Such gamesmanship is not merely theoretical. In fact, it is real, and ongoing. To cite one current example: There are now two pending lawsuits in two different jurisdictions, filed months apart, both involving requests to the same government agency pursuant to FOIA for substantially the same information. The clear intent of both of the requestors is to use the confidential information they hope to receive to harm *amici*, their members and others similarly situated. *Amici's* detractors have, at this time, prevailed in district court in one of the two cases, although the case is currently stayed pending appeal. In the other, summary judgment is pending.

The first case was filed by Humane Society International on April 18, 2016, in the District Court for the District of Columbia. *See Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. 16-cv-00720 (D.D.C. filed Apr. 18, 2016) (the "HSI Case"). The second was filed less than three months later by another detractor of *amici*, the Center for Biological Diversity, in federal court in Arizona. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, No. 16-cv-00527, (D. Ariz. filed August 9, 2016) (the "CBD Case").[15]

15. It is unsurprising that the plaintiffs in these two cases chose to file suit in the D.C. Circuit and the Ninth Circuit. Those

The plaintiffs in the two cases had sought, by way of a FOIA request to the Fish and Wildlife Service ("FWS"), records in FWS's electronic Law Enforcement Management Information System ("LEMIS") for the years 2002 through 2010, 2013 and 2014 (the HSI Case), and 2005 to the present (the CBD Case). The requested data sets total tens of thousands of confidential entries relating to imports and exports of animals by private persons and entities of any taxonomic class, whether live, dead, parts or products. In both cases, in response to the activists' requests, FWS withheld certain portions of the LEMIS data under FOIA Exemption 4. HSI and CBD sued – albeit in different jurisdictions.

On March 30, 2018, the district court in the CBD Case granted summary judgment to CBD. 2018 WL 1586648. In articulating the Exemption 4 "confidential" test, the district court explicitly relied on the standard of *Secrets and Smokescreens*, as quoted in *Public Citizen*. *Id.*, at *4 n. 2. And, in granting CBD's summary judgment motion and directing FWS to provide documents responsive to CBD's FOIA request, the district court relied on *National Park's* atextual definition of the term "confidential,"

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two Circuits have the most generous, consistently pro-plaintiff readings of FOIA's Exemption 4. Both the D.C. Circuit and the Ninth Circuit have held that for FOIA's Exemption 4 to apply, there must be a showing of likely "substantial competitive harm," and that the private party whose confidential materials are threatened to be disclosed must affirmatively show that the plaintiff is a "competitor" (based on the law-review inspired *Secrets and Smokescreens* test). *See Public Citizen*, 704 F.2d at 1291 n. 30; *Watkins*, 643 F.3d at 1195. That plaintiffs chose to file in these two jurisdictions underscores their gamesmanship of the judicial system in order to ensure receipt of confidential materials.

concluding: "Based on the circumstances of this case, the corporate speculations are insufficient to support exemption . . . CBD is entitled to a dataset including the Exemption 4 information at issue." *Id.*

On November 15, 2018, the district court granted *amicus* NABR's Motion to Intervene in that case for the purpose of appealing the district court's judgment to the Ninth Circuit. CBD Case, ECF 91. CBD has filed a Motion for Reconsideration of that Order, which Motion remains pending as of the date of this filing. *See id.*, ECF Nos. 92, 94, 95. In the meantime, the appeal of the CBD Case has been stayed by the Ninth Circuit. Order, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 18-15997 (9th Cir. Jan. 14, 2019), ECF No. 22.

Meanwhile, in the HSI Case filed in the District of Columbia, which was brought to obtain virtually the same information to use against *amici* as was sought by the plaintiffs in the CBD Case, cross-motions for summary judgment are pending. *See* HSI Case, ECF Nos. 32-36. In its motion for summary judgment, HSI explicitly relied on the district court's ruling in the CBD Case (and failed to mention that the ruling had been stayed by the Ninth Circuit). *See* HSI Motion for Summary Judgment, HSI Case, ECF No. 36, p. 23 ("the Court in CBD analyzed these exact allegations of harm from many of the exact same companies, and held that FWS did not meet its burden to justify nondisclosure, holding that 'the corporate speculations are insufficient to support exemption'") (quoting CBD Case, 2018 WL 1586648 at *4-7). The HSI Case, like the CBD Case, remains pending.

Unless this Court returns the term "confidential" to its proper, textual meaning, there is a strong possibility that

both HSI and CBD will prevail. However, because of the unsettled nature of the term "confidential" in Exemption 4, there also is a possibility that one of the two cases will be resolved in favor of the activist group which made the FOIA request, and the other in favor of FWS. If such a scenario occurs, FWS's victory will be pyrrhic. Once the prevailing activist obtains the FOIA'd documents, those confidential documents will be made public.

As this Court recognized when it issued the stay earlier in the procedural history of this case in Petitioner's favor, once a private party's "confidential" information is provided to another private party by way of a FOIA request, there is no going back. If the defendant loses somewhere, the defendant loses everywhere.

As Petitioner notes, *stare decisis* has bound the lower courts from remedying the defects inherent in *National Parks* and *Public Citizen*. Pet. Brief, 14. This Court, having never considered (until now) the appropriateness of the D.C. Circuit's antiquated, atextual tests virtually defining the word "confidential" out of the FOIA statute (but only as to Exemption 4), is not similarly bound. By overturning the lower courts' prior precedents, this Court will return the term "confidential" to its plain meaning. That is reason enough to reverse. However, by replacing the lower courts' wrong-headed precedent with a simple test of confidentiality based on the submission of a declaration as to confidentiality, the Court will also prevent gamesmanship by those who wish to wrongly use the flexible *National Parks* and *Public Citizen* tests to their advantage, as the plaintiffs in the CBD Case and HSI Case are currently doing.

V. A RECENT REPORT SHOWS THE PERVASIVE MISUSE OF FOIA BY *AMICI*'S DETRACTORS IN THE ABSENCE OF A MEANINGFUL EXEMPTION 4 TEST

In its *amicus* brief in support of Petitioner's Petition for Certiorari, *amici* referenced an analysis, conducted by *amicus* NABR, of FOIA requests submitted to APHIS in 2015. That analysis found that, in 2015, APHIS received 889 requests for information under FOIA. "Approximately 30 percent (265) of the FOIA requests, which is a 23% increase from [2014], could be identified as submitted by animal rights/animal interest organizations, or individuals that appeared to be associated with such groups." *FY 15: Animal Rights FOIA Requests*, National Association for Biomedical Research (May 19, 2016), https://www.nabr.org/wp-content/uploads/2016/05/FY2015-FOIA-Report-Final.pdf (the "2015 NABR Report"), p. 2.[16] The NABR Report also found that approximately 10% (128) of the 1,273 FOIA requests received by the National Institutes of Health ("NIH") in 2015 came from animal rights/animal interest organizations. *Id.* at p. 5. "Almost all of the 123 requests filed by animal rights groups sought information related to research and research organizations." *Id.* at p. 6.[17]

NABR recently published a similar report for fiscal year 2017. *See A Review of Animal Rights FOIA Requests Fiscal Year 2017*, National Association for Biomedical

16. The estimated cost to APHIS of handling the FOIA requests it received in 2015 was $1,836,896.28. NABR Report, p. 4.

17. The estimated cost to the NIH of handling its FOIA requests in 2015 was $3,621,518.15. NABR Report, p. 6.

Research (Dec. 19, 2018), https://www.nabr.org/wp-content/uploads/2018/12/The-FY2017-FOIA-Report-Final.pdf (the "2017 NABR Report"). The 2017 NABR Report confirms that both FOIA requests in general, and FOIA requests by *amici*'s detractors, have been steadily increasing since 2015.

> For FY 2017, there were 1,647 requests posted to the APHIS FOIA logs; 350 (21%) of those were from animal rights groups or appeared to be from people associated with animal rights groups and 69 (20%) of those requests involved research facilities. ***This is [a] 51% increase in total requests with a 50% increase in requests made by animal rights groups.***

2017 NABR Report, p. 2 (emphasis added). The costs to APHIS for processing and handling FOIA requests in fiscal year 2017 was $2,753,299. *Id.* at p. 4. Of those costs, the government recouped $0. *Id.* at p. 5.

As with APHIS, the total number of FOIA requests and the total number of animal rights-related FOIA requests to NIH also increased in fiscal year 2017. "During FY 2017, the National Institutes of Health (NIH) received a total of 1,363 FOIA requests. Approximately 12% (165) of the requests were submitted by animal rights/animal interest organizations, or individuals identified as being associated with such groups." *Id.* at p. 5. The costs to NIH for processing and handling FOIA requests in fiscal year 2017 was $3,163,391. *Id.* at p. 6. Of this amount, the government recouped 1.7%. *Id.*

Under a plain reading of the statute's text, where a FOIA request is seeking material that is confidential and commercial or financial in nature, the request would and should be summarily rejected. Nonetheless, in light of *National Parks* and *Public Citizen*, detractors of *amici* boldly and unabashedly make hundreds of FOIA requests a year in order to obtain the confidential commercial or financial information of *amici*, their members and similarly situated entities. A plain language reading of Exemption 4 undoubtedly would help remedy this situation.

The word "confidential" in Exemption 4 should be construed to mean that whatever information a party designates and treats as "confidential" and does not, for whatever reason, normally share with the public should be protected from disclosure – including for reasons to safeguard against reputational harm or harassment. FMI is right in urging this Court to restore the word "confidential" to its plain meaning. By doing so, the Court will afford *amici* the Exemption 4 coverage to which they rightfully are entitled under FOIA.

VI. CONCLUSION

Words mean what they say. In the absence of an obvious statutory basis to change the plain language meaning of the word "confidential" – which the D.C. Circuit has never provided, and which does not exist – the plain language meaning of the word should be retained. If Congress wishes to change the language of Exemption 4 to make it more in line with the D.C. Circuit's interpretation, it has the power to do so. The D.C. Circuit does not. This Court should overrule the atextual precedent of *National Parks* and *Public Citizen*, thereby reinvigorating the statute with its plain meaning.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN SMALL BUSINESS LEAGUE IN SUPPORT OF RESPONDENT ARGUS LEADER MEDIA

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I.
INTEREST OF *AMICUS CURIAE*[1]

Perhaps no non-media organization has brought more Freedom of Information Act ("FOIA") lawsuits over the last three decades than the American Small Business League. American Small Business League has fought hard, and successfully, to advance the interests of small businesses. It has crusaded effectively and zealously to ensure that small businesses get their share of federal subcontracting dollars as required by the Small Business Act. It has a currently-pending case against the Department of Defense and the Department of Justice seeking access to information about subcontracting plans required by the government's Comprehensive Subcontracting Plan Test Program (hereafter "Test Program").

Against that background, American Small Business League strongly opposes the effort by Petitioner to discard decades of settled precedent and weaken FOIA. Neither the text of Exemption 4 nor the settled interpretation of it justify jettisoning the requirement that businesses seeking to withhold information show a likelihood of substantial competitive harm in order to prevail on a claim of exemption. And the interpretation championed by Petitioner would allow compliant or corrupt government officials, acting in concert with large businesses, to evade public scrutiny of how billions of tax dollars are spent.

American Small Business League's mission to ensure that prime contractors, including large defense contractors, not hide their compliance, or lack thereof, with the Small Business Act's subcontracting goals gives the American Small Business League a unique perspective on the issues in this case. Ameri-

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to this brief being filed.

can Small Business League respectfully submits that the lower courts' judgments in this case – which relied on evidence, not speculative assertions of harm – should be affirmed.

II.
SUMMARY OF ARGUMENT: EXEMPTIONS ARE NARROWLY CONSTRUED, BURDEN IS ON GOVERNMENT TO JUSTIFY NON-DISCLOSURE, AND *NATIONAL PARKS* INTERPRETS EXEMPTION 4 ACCURATELY. PETITIONER'S INTERPRETATION WOULD MAKE IT NEARLY IMPOSSIBLE TO UNCOVER WASTEFUL SPENDING.

FOIA's core purpose is to "permit public access to official information long shielded unnecessarily from public view" and to "create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976).

FOIA embodies this Court's observation, in the context of access to judicial proceedings, that, " 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' " *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 13 (1986) (quoting *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 572 (1980)).

The cardinal rule in FOIA cases is that exemptions "must be narrowly construed" in light of FOIA's "dominant objective" of disclosure, not secrecy. *Department of Air Force*, 425 U.S. at 361. The corollary is that the burden rests upon the government, or the opponent of disclosure, to show that an exemption properly applies to the records it seeks to withhold. *Hamdan* v. *U.S. Department of Justice*, 797 F.3d 759, 772 (9th Cir. 2015).

The narrow construction requirement, and the placement of the burden on those resisting disclo-

sure, are especially important features of FOIA litigation because the government, or a submitter of information, knows what it is withholding, and how the information might or might not cause competitive harm. The requester, on the other hand, does not know what is being withheld, or how the information might or might not cause competitive harm.

Thus, if exemptions are not narrowly construed, the government, and businesses that submit information to the government to obtain large government contracts, will enjoy an advantage in FOIA litigation which would be nearly impossible to overcome. *See In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 301, 307-09 (2001).

Trade secrets and similar confidential business information are easy to claim. Many businesses would like to have their cake and eat it too: they would like to obtain millions (or in the case of big defense contractors, billions) of dollars in government contracts, without letting the taxpayers who fund those contracts know where the money is going or how well the contract is being performed.

In numerous FOIA cases, either the government or the submitter of information, or both, will submit a formulaic recitation of a claimed trade secret or confidentiality requirement and a speculative assertion of potential harm. The requester, who does not know what is being withheld, will have no way of overcoming the assertion if FOIA is interpreted the way Petitioner and its amici would like.

The case of *GC Micro* v. *Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994), is a good example of that. In *GC Micro* a small computer software company sought records relating to the utilization of small disadvantaged businesses by major federal defense contractors. The Defense Logistics Agency ("DLA") submitted declarations by officers of each of the three corporations involved, Loral Aerospace, McDonnell Douglas Corporation, and Northrop

Corporation. Each declaration stated that disclosure of information on a federal form would cause harm to their competitive positions because it would provide competitors with a roadmap of their subcontracting plans. *Id.* at 1113-14.

The Ninth Circuit observed,

> While the law does not require the DLA to engage in a sophisticated economic analysis of the substantial competitive harm to its contractors that might result from disclosure, in order to prevail the DLA must meet its burden of showing a potential of substantial competitive harm to its contractors. The DLA has not met this burden . . . we must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information. Based on the record in this case, we believe that FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy . . . . It is questionable whether the declarations submitted by the three contractors show *any* potential for competitive harm, let alone *substantial* harm. Congress did not pass Exemption 4 to protect large corporations from persistent computer salespeople.

Id. at 1115 (emphasis in original).

In contrast to the sensible approach taken in *GC Micro* and other cases, the approach taken by Petitioner and its amici would allow both the government and large government contractors – who already wield enormous power and wealth – to keep information from the public simply by saying that it is confidential. That would turn FOIA on its head.

The D.C. Circuit's interpretation of Exemption 4 in *National Parks and Conservation Association v. Morton* ("*National Parks*"), 498 F.2d 765, 770 (D.C. Cir. 1974) is consistent with the requirements that

FOIA exemptions be construed narrowly and that opponents of access bear the burden of proof, and Petitioner's interpretation is not. *See Argus Leader Media v. U.S. Department of Agric.*, 889 F.3d 914, 916 n.4 (8th Cir. 2018) (rejecting argument that " 'confidential' means 'secret' " based on " 'the Supreme Court's admonition that FOIA exemptions 'must be narrowly construed,' " and holding that "[u]nder [Food Marketing Institute]'s reading, Exemption 4 would swallow FOIA nearly whole") (quoting *Milner v. Department of Navy*, 562 U.S. 562, 565 (2011)). The Eighth Circuit's decision should be affirmed.

III.
ARGUMENT

A. REAL-LIFE EXAMPLES DEMONSTRATE HOW HOLLOW ASSERTIONS OF CONFIDENTIALITY OFTEN WILT UNDER SCRUTINY.

A very recent pair of cases involving American Small Business League exemplifies the extent to which both the government and large government contractors will go to keep information from seeing the light of day even when no true trade secrets or competitive harm are involved. In *American Small Business League* v. *U.S. Department of Defense*, Case No. 14-cv-2166 (N.D. Cal.), American Small Business League sought disclosure of Sikorsky Aircraft Corporation's fiscal year 2013 Comprehensive Small Business Subcontracting Plan ("the Plan").[2] Sikorsky

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[2] Sikorsky is a defense contractor famous for helicopters such as the UH-60 Black Hawk and the MH-60R Seahawk. *See Sikorsky BLACK HAWK Helicopter*, SIKORSKY AIRCRAFT CORP., https://www.lockheedmartin.com/en-us/products/sikorsky-black-hawk-helicopter.html (last visited March 22, 2019); *Sikorsky MH-60R SEAHAWK Helicopters*, SIKORSKY AIRCRAFT CORP., https://www.lockheedmartin.com/en-us/products/sikorsky-mh-60-seahawk-helicopters.html (last visited March 22, 2019). The Plan described Sikorsky's small business subcontracting goals, consistent with the Small Business Act. *See infra* at § III.D (discussing Small Business Act procurement programs, includ-

intervened in the case and initially joined with the Department of Defense in objecting to disclosure of nearly all of the information in the Plan.

Sikorsky insisted that information in the Plan was confidential under Exemption 4. But its claim of confidentiality wilted under cross-examination. As the government itself later stated in a letter to Sikorsky's counsel,

> This discovery revealed that at least for some of the information that had been redacted, the Company's witnesses were unable to establish that there is a likelihood of substantial competitive injury in the relevant market. . . . This failure is particularly acute given that the information in the Plan is now over five years old. First, Ms. Johnson, Sikorsky's supply chain executive, was unable to provide any detailed information regarding the subcontracts at issue during her deposition. She could not recall the details of any non-disclosure provisions used by Sikorsky to limit dissemination of information. . . . She did not know whether Sikorsky's contracts with suppliers required exclusivity . . . . Prior to reaching her conclusion that disclosure would harm Sikorsky's competitive interests, she did not check whether Sikorsky is currently still using any of the subcontractors, and when asked, did not know with certainty.

November 7, 2017 Letter from Paul Jacobsmeyer, Chief of U.S. Department of Defense Freedom of Information Division, to Sikorsky lawyer Rex Heinke, filed December 7, 2018 as ECF No. 47-4 at 3 in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

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ing the Test Program under which Sikorsky provided the Plan to the government).

Another Sikorsky witness fared even worse when questioned at deposition about the conclusory assertions of confidentiality she had made in a sworn declaration. This witness, Martha Crawford, was asked, "is there any fact that supports your conclusion that the release of any of these redactions would harm Sikorsky?" She replied, "No." The questioner then asked, "I understand your answer to be no, there are no facts." Crawford answered, "That's correct." Crawford Deposition Tr. at 185:9-18, filed December 7, 2018 as ECF No. 47-14 at 4 in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

Eventually, given the Sikorsky witnesses' complete inability to substantiate declarations which the Court found "generic and generally unpersuasive," the Department of Defense decided to release the information at issue in the Plan, after giving Sikorsky an opportunity (of which Sikorsky did not avail itself) to take court action to enjoin release. March 14, 2018 letter from Paul Jacobsmeyer, Chief of U.S. Department of Defense Freedom of Information Division, to Sikorsky lawyer Rex Heinke, filed December 7, 2018 as ECF No. 47-6 at 2-3, in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

The government has nevertheless withheld information in more recent Comprehensive Small Business Subcontracting Plans under Exemption 4, based in part on the same Sikorsky witness's, Ms. Crawford's testimony. *See American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA, 2019 WL 1100372, at **5-7 (N.D. Cal. Mar. 8, 2019). In *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.), American Small Business League is fighting to enforce its right of access to that more recent information as well.

The result in American Small Business League's 2014 lawsuit was important. Sikorsky's 2013 Com-

prehensive Small Business Subcontracting Plan revealed that it had reduced its small business subcontracting goals since the prior year, including its goals for women and veteran owned small businesses. *See* Sikorsky Aircraft Corporation Comprehensive Small Business Subcontracting Plan for Fiscal Year 2013, filed December 7, 2018 as ECF No. 47-24 at 8-9, in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.). Also, more broadly, it allowed American Small Business League to look behind the curtain and assess for itself Sikorsky's small business subcontracting efforts based on actual data, at least to the extent permitted by the Plan. The public and groups like American Small Business League need actual data to independently evaluate, *inter alia*, whether the Comprehensive Small Business Subcontracting Test Program is helping small businesses. *See infra* at § III.D.

B. THE MILITARY-INDUSTRIAL COMPLEX IS BETTER EQUIPPED TO BEAR ANY "BURDEN" ASSOCIATED WITH SUBSTANTIATING CONFIDENTIALITY CLAIMS THAN AN EVERYDAY CITIZEN.

Petitioner's amicus the Chamber of Commerce of the United States complains to this Court that the *National Parks* test has "imposed substantial burdens on courts and litigants." Chamber of Commerce Amicus Brief at 10. This is a one-sided view which bears little relationship to reality. It ignores the burdens imposed upon everyday citizens and small businesses who want to obtain information from their government about how their tax dollars are spent, and the burdens imposed upon businesses and citizens who write big checks to the government on April 15 to pay for government employees' salaries and prime contractors' profits. For example, American Small Business League's 2014 and 2018 lawsuits against the Department of Defense take on a government agency which spends hundreds of billions of taxpayer dollars a year, and a subsidiary of a For-

tune 500 company which gets billions of taxpayer dollars a year.[3]

We respectfully submit that a company which gets $36 billion a year from the government in taxpayer dollars is better equipped to bear whatever "burdens" arise from justifying confidentiality claims than a small business watchdog group or a citizen. Likewise, the government itself – which generally aligns with private parties claiming confidentiality[4] – is well equipped to bear the minuscule burden involved in defending the rare FOIA case.

As Respondent points out, very few FOIA requests turn into litigation: the overwhelming majority of FOIA requests are resolved at the administrative level. Less than one-tenth of one percent of FOIA requests turn into litigation, and of those, very few get to discovery, and fewer still to trial. Brief for Respondent at 57 & n.27. In the almost 30 years between 1979 and 2008, there were just 88 FOIA trials (fewer than three per year), only a fraction of which concerned Exemption 4.

C. SECRECY, OR OVERBROAD ASSERTIONS OF CONFIDENTIALITY, CAN MASK CORRUPTION, INEFFICIENCY, AND WASTE.

President Dwight Eisenhower famously warned of

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[3] Lockheed Martin Corporation, of which Sikorsky is a subsidiary, reported 2015 sales of $46.1 billion, with a backlog of $99.6 billion; 78.1 percent of its sales were to the U. S. Government. ECF No. 47-12 at 6-7, filed December 7, 2018 in *American Small Business League* v. *U.S. Department of Defense*, Case No. 3:18-cv-01979-WHA (N.D. Cal.).

[4] As noted above in section III.A, the Department of Defense in a 2014 case eventually agreed to release information over Sikorsky's objections, but when American Small Business League made a similar request later, the DOD again sided with the defense contractors and has provided free legal help for them in the currently-pending litigation involving American Small Business League.

the dangers of giving what he called the "military-industrial complex" too much power. In the nearly 60 years since that warning, the Pentagon and its prime contractors have grown even more powerful. FOIA was enacted to allow the public to keep a watchful eye on how its money is spent, and no agency spends more federal money than the Pentagon, which has been known to purchase toilet seats for $640 apiece and fighter planes for a million times that amount. Brief for Respondent at 54 & n.23. This Court should not enact a regime which would allow the government and government contractors to keep information secret with a mere "because I said so."

In a June 2016 report from the Department of Defense's own Office of Inspector General, the Inspector General concluded that the Pentagon could not account for a staggering *$6.5 trillion* in spending in 2015 alone. Scot Paltrow, *U.S. Army fudged its accounts by trillions of dollars, auditor finds*, REUTERS (Aug. 19, 2016, 8:08 a.m.), https://www.reuters.com/article/us-usa-audit-army-idUSKCN10U1IG (last visited March 22, 2019).

Later, in a November 15, 2018 report, the Department of Defense's Office of the Inspector General stated, following an attempt at an audit of the Department of Defense's financial records, that, rather than shedding light on the Department of Defense's mysterious expenditures, the Inspector General had been "unable to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion," due in part to "material weaknesses in internal control over financial reporting that affected DOD as a whole." *Memorandum for Secretary of Defense, Under Secretary of Defense (Comptroller) / Chief Financial Officer, DOD*, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF DEFENSE 2-3 (Nov. 15, 2018), *available at* https://comptroller.defense.gov/Portals/45/Documents/afr/fy2018/DoD_FY18_Agency_Financial_Report.pdf#page=138.

In a speech the day before September 11, 2001, Secretary of Defense Donald Rumsfeld presaged these accounting problems at the Pentagon, stating:

> The technology revolution has transformed organizations across the private sector, but not ours, not fully, not yet. We are, as they say, tangled in our anchor chain. Our financial systems are decades old. According to some estimates, we cannot track $2.3 trillion in transactions. We cannot share information from floor to floor in this building because it's stored on dozens of technological systems that are inaccessible or incompatible.

Donald Rumsfeld, *DOD Acquisition and Logistics Excellence Week Kickoff – Bureaucracy to Battlefield*, U.S. DEPARTMENT OF DEFENSE (Sept. 10, 2001), *available at* https://web.archive.org/web/20100301161721/http://www.defense.gov/Speeches/Speech.aspx?SpeechID=430 (last visited March 22, 2019).

Finally, in a much earlier instance of famous cost overruns at the Pentagon that reached this Court, a management analyst at the Department of the Air Force, A. Ernest Fitzgerald, lost his job approximatly one year after reporting, "[t]o the evidenct embarrassment of his superiors in the Department of Defense," that "cost-overruns on the C-5A transport plane could approximate $2 billion. He also revealed that unexpected technical difficulties had arisen during the development of the aircraft." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 734 (1982).

The suggestions by Petitioner and its amici that this Court should do away with the requirement of narrow construction of exemptions, or allow alleged harm to corporate reputation to justify nondisclosure, Petitioner's Brief at 50, both lack merit and would seriously undercut FOIA's core purpose. As noted above, both the government and the submitter of information are in the best position to

explain why an exemption should apply. Narrow construction of exemptions, and the placement of the burden on the government to justify non-disclosure, are essential to preserve a level playing field under FOIA.[5] *See ACLU* v. *U.S. Department of Justice*, 880 F.3d 473, 483 (9th Cir. 2018) (disclosure is the dominant purpose of FOIA, and exemptions are to be narrowly construed).

The suggestion that harm to reputation should suffice to justify non-disclosure would be inconsistent with FOIA's core purpose of allowing the public to monitor the spending of public money. As this Court has observed, "the value of a trade secret lies in the competitive advantage it gives its owner over competitors," not any protection from embarrassing fallout such as "the harmful side effects of [its] product." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984); *see also NBC Subsidiary (KNBC-TV, Inc.)* v. *Superior Court*, 20 Cal. 4th 1178, 1208 (1999) (closure of unfair trade practices lawsuit not justified merely in order to minimize damage to corporate reputation); *Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) (public has First Amendment right of access to civil proceedings concerning motion for preliminary injunction in securities litigation; closure is not warranted to protect against "potential harm" from "disclosure of poor management in the past" which "is hardly a trade secret") (internal citation and quotation marks omitted). For example, a defense contractor may get a multi-billion dollar contract to manufacture a plane that doesn't fly properly or a weapons system which proves defective or ineffective. The revelation that a company took billions of government dollars to deliver a defective product might harm its reputation, but it is not a trade secret. It is information the public has a right and a need to know.

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[5] It should be noted that disclosure of information under FOIA promotes a level playing field. If competitors all have access to information about government contracts, none of them will suffer competitive harm.

As courts have observed, access to public information can expose "corruption, incompetence, inefficiency, prejudice and favoritism." *NBC Subsidiary*, 20 Cal. 4th at 1211 n.28 (internal citations omitted). U.S. taxpayers pay for billions of dollars in federal spending, and a lot of that goes to private companies. Not all of it is well spent. The public has a right to know where its money goes, and companies who get big government contracts have to expect some level of public scrutiny of whether government money is well spent.

Another reason this Court should not discard decades of precedent under Exemption 4 is that this precedent has given rise to the favorable judgment of experience.

> [T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entrée to particular proceedings or information. . . . a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics.

Richmond Newspapers, 448 U.S. at 589 (Brennan, J. concurring).

D. THE SMALL BUSINESS ACT, WHICH IT IS AMERICAN SMALL BUSINESS LEAGUE'S MISSION TO ENSURE IS FOLLOWED BY THE GOVERNMENT AND ITS PRIME CONTRACTORS, UNDERSCORES THE IMPORTANCE OF THE *NATIONAL PARKS* TEST.

The structure and purpose of the Small Business Act underscores the importance of preserving the *National Parks* test and affirming the Eighth Circuit.

The Small Business Act is intended to promote small businesses in order to

> . . . preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

15 U.S.C. § 631. As the Congressional Research Service has explained,

> In economic terms, the congressional intent was to assist small businesses as a means to deter monopoly and oligarchy formation within all industries and the market failures caused by the elimination or reduction of competition in the marketplace.

Small Business Size Standards: A Historical Analysis of Contemporary Issues, CRS Report No. R40860, CONGRESSIONAL RESEARCH SERVICE 1 (Feb. 1, 2019), *available at* https://crsreports.congress.gov/product/pdf/R/R40860.

> In furtherance of these objectives, the Small Business Act
>
> . . . directs the President to "establish Governmentwide goals for procurement contracts awarded to small business concerns," which "shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year." 15 U.S.C. § 644(g)(1)(A), (i). The Act also requires federal agencies to set individual goals, *id.* § 644(g)(2)(A), and directs the Small Business

> Administration . . . to submit an annual report to the President and Congress explaining whether federal agencies achieved these goals, *id.* § 644(h)(2)(B)-(C).

American Small Business League v. *Contreras-Sweet*, 712 F. App'x 667, 667-68 (9th Cir. 2018).

The Small Business Act generally "requires prime contractors to submit 'Individual Subcontracting Plans' for each contract to show how government contracts and subcontracts are awarded to small businesses." *American Small Business League*, 2019 WL 1100372, at *1; *see also* 15 U.S.C. § 637(d); 48 CFR § 19.702(a). However, a so-called "Test Program" "allow[s] certain large defense contractors to instead submit a single annual 'Comprehensive Subcontracting Plan' for an entire plant, division, or company to identify all subcontract amounts awarded to small businesses on government contracts." *American Small Business League*, 2019 WL 1100372, at *1. "Test Program participants must submit their Comprehensive Subcontracting Plan to the DOD each year for review and approval." *Id.*

The subcontracting plans of prime contractors, and ensuing communications about the extent to which plans are consistent with the government's small business goals and are being adequately executed, provide hard numbers that are essential to the public and groups like American Small Business League in assessing whether the Small Business Act is helping small businesses, not large government contractors. But if Petitioner's interpretation of FOIA is adopted, information about compliance with Small Business Act goals may never see the light of day.

American Small Business League's watchdog efforts – which involve unearthing information, including hard numbers, on how small business subcontracting dollars are being spent – are essential to making the Small Business Act work.

First, public discourse based on hard numbers provides government agencies with a political incentive to comply with the Small Business Act. As the Small Business Administration's Inspector General stated in 2005, "One of the most important challenges facing the Small Business Administration (SBA) and the entire Federal Government today is that large businesses are receiving small business procurement awards and agencies are receiving credit for these awards." Harold Damelin, *New Management Challenge – Large Businesses Receive Small Business Awards, Report # 5-15*, U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL (Feb. 24, 2005), *available at* http://www.asbl.com/documents/05-15.pdf. As one Congressional Research Service Report explains, "[t]here are no punitive consequences for not meeting the small business procurement goals" that agencies set for themselves. *Small Business Administration: A Primer on Programs and Funding, CRS Report No. RL33243*, CONGRESSIONAL RESEARCH SERVICE 23 (Feb. 21, 2019), *available at* https://crsreports.congress.gov/product/pdf/RL/RL33243/96. However, "media attention" and questions from Members of Congress incentivize government agency compliance. *Id.* Public access to Small Business Act compliance information is needed to ensure this sort of public scrutiny is fact-based and effective.

Second, public discourse based on hard numbers incentivizes good faith compliance with the Small Business Act by prime contractors. The Small Business Act directs prime contractors to give part of their government payouts to small business subcontractors. Prime contractors have a strong incentive to do the minimum necessary to secure future government business. The best medicine for this problem is sunlight.

Third, public discourse based on hard numbers allows the public and groups like American Small Business League to meaningfully evaluate how Congress and the Executive Branch have defined "small business" under the Small Business Act. The

Small Business Act provides that a small business must be "independently owned and operated" and "not dominant in its field of operation." 15 U.S.C. §632(a)(1); *see also* 48 CFR § 19.703 (eligibility requirements for small business subcontracting program).

Fourth, public discourse based on hard numbers is needed to assess whether the Department of Defense's Comprehensive Small Business Subcontracting Plan Test Program should continue. In a 2015 report, the Government Accountability Office asserted that the Test Program helps "participants," some of the largest defense contractors, by reducing their administrative costs. *See Action Needed to Determine Whether DOD's Comprehensive Subcontracting Plan Test Program Should Be Made Permanent, Report No. GAO-16-27*, GOVERNMENT ACCOUNTABILITY OFFICE 7-8 (Nov. 2015), *available at* https://www.gao.gov/assets/680/673649.pdf; *see also id.* at 3 (listing large defense contractor Test Program participants as of Fiscal Year 2015). But the report included comments from the Department of Defense to the effect that the Test Program did not help the small businesses it was supposed to. *Id.* at 28-30. A chart provided by the Department of Defense showed that "the percentage of dollars subcontracted to small businesses by all of the [Test Program] participants combined declined over the life of the [Test Program] from approximately 46% in FY96" to "24% in FY14." *Id.* at 30. To assess how this happened, and, if appropriate, make a case for change, the public and groups like American Small Business League must be able to look behind numbers like these and review hard data submitted by prime contractors, like the FY2013 Plan the American Small Business League secured in its 2014 lawsuit.

As our society grapples with how to allocate hundreds of billions of taxpayer dollars to government contractors, it is critical that it have access to hard numbers. The public needs hard numbers to ensure

that discourse about the Small Business Act's future is based on facts, not speculation or political posturing.

The requirement under *National Parks* that the government or submitters of information show likely competitive harm in order to withhold information under Exemption 4 is necessary to ensure that the public and groups like American Small Business League can make informed judgments about how the Small Business Act is working. Eliminating the competitive harm element of the *National Parks* test would invite prime contractors to conceal information about Small Business Act goals and performance with minimal effort. And prime contractors would have strong incentives to accept that invitation: avoiding public scrutiny of their Small Business Act compliance, or lack thereof, and denying the public information that could support policy, regulatory, or statutory changes.

To ensure that the public and groups like American Small Business League can continue to monitor how hundreds of billions of taxpayer dollars are spent, Petitioner's novel interpretation of Exemption 4 should be rejected, and the Eighth Circuit's decision should be affirmed.

IV.
CONCLUSION

Petitioner has asked this Court to discard decades of precedent and to keep the public in the dark about how billions of dollars of government money are spent. This Court should decline the invitation. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BIOSCIENCE ADVISORS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

BioScience Advisors, Inc. ("BioSci") is a small consulting firm whose principal, Mark Edwards, regularly acts as an advisor and negotiator on behalf of companies in the pharmaceutical and biotechnology industries (the "BioPharma Industry"). BioSci provides information, interpretation, and advice on technology, compound or product development and commercialization agreements. As part of its consulting services, BioSci obtains, organizes and provides market data from development, co-development and commercialization agreements.

Since many BioPharma companies are SEC-reporting companies, BioSci collects agreements and information from SEC filings.Under Mr. Edwards' supervision, BioSci's database, BioSciDB,[2] contains copies of approximately 25,000 license, development, co-development, joint venture, distribution, asset purchase and other arm's-length agreements that

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[1] Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Prior to the creation of BioSciDB, Mr. Edwards was involved in the creation of other industry databases, including the Recap Corporate Alliances Database and RecapIQ.

have been publicly filed with the SEC. Where companies request confidential treatment for certain information, BioSci first reviews redacted copies. Subsequently, BioSci works to obtain unredacted copies. It has obtained more than 15,000 unredacted agreements, with the majority obtained via Freedom of Information Act (FOIA) requests. BioSciDB has more than one hundred subscribers, primarily companies and research institutions, including Amgen, Cedars Sinai, Childrens Hospital of Philadelphia, Cornell University, Dana Farber, Gilead Sciences, Merck, Mount Sinai, Ohio State University, and Roche.

The BioPharma industry appears to appreciate the work of BioSci and Mr. Edwards. In 2008, Mr. Edwards was awarded a Lifetime Achievement Award by the American Liver Foundation for "two decades of leadership, thoughtful insights and detailed analysis of the biotechnology industry." Mr. Edwards is currently on the boards of directors of The Scripps Research Institute and AcelRx Pharmaceuticals. Mr. Edwards has been a retained consultant for more than 50 BioPharma companies and universities, including Amgen, Bayer, Boehringer Ingelheim, Brigham Young University, Bristol-Myers Squibb, Elan, Eli Lilly, GlaxoSmithKline, Johnson & Johnson, Max Planck, Pfizer, Roche, State University of New York, and UCLA.

To the extent that the Court addresses the scope of Exemption 4,[3] BioSci, and as argued herein—the BioPharma industry itself—have an interest in the outcome of this proceeding. BioSci asks that the Court construe Exemption 4 in a reasonable manner, providing for the continuing appropriate balancing of confidentiality interests with the broader interests of the economy to enable accurate disclosure and access to information.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If the Court reaches the merits of Exemption 4, it should reject Petitioner's arguments. BioSci would be negatively affected by this Court adopting Petitioner's preferred construction. BioSci provides a valuable service to the drug development industry, and those services would not be possible without the current well-functioning and balanced FOIA system. That system allows BioSci to lawfully collect key transaction data from historical transaction documents submitted to the SEC. This key data includes information like royalty rates, upfront payment, milestones, and alliance terms. Some commentators on the U.S.'s world-leading status in pharmaceutical innovation credit the availability of such data. Furthermore, BioSci's curation of this BioPharma industry data does

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[3] It appears that Amici's position on Exemption 4 may be relevant only if this Court finds that Petitioner has Article III standing, and further if the Court rules as requested by Petitioner regarding the applicability of 7 U.S.C. § 2018(c). Amici takes no position on these threshold issues.

not hurt individual industry actors, but rather benefits the entire industry by facilitating good decision-making, enhancing and confirming the importance of existing disclosure laws, and avoiding less desirable services that would emerge and thrive under a lasting secrecy regime.

Through the FOIA processes described, BioSci provides a valuable service to the drug development industry. SEC-reporting BioPharma companies usually request confidential treatment for certain business information in agreements filed with the SEC. BioSci initially collects redacted versions of SEC-filed agreements and later attempts to secure less-redacted versions through FOIA requests. Under current law, SEC grants of confidentiality are time-limited unless the filer continues to request confidentiality and provides substantiation. Furthermore, reporting companies often choose to not renew requests for confidential treatment, and/or decline to oppose FOIA requests. A company actor may and often does consider certain deal information "confidential" at the time of the original SEC submission. But in the fast-moving BioPharma industry, within an often short period of time, that same industry actor often considers that same deal information to be non-confidential or irrelevant. Rationales for this shift in position vary, and include technological obsolescence, or changes in the reporting company's relationship to that technology.

That formerly confidential data may be stale to the submitter, but its use as data for the entire industry is invaluable. BioSciDB is built upon FOIA requests seeking once-confidential data. BioSciDB contains

copies of approximately 25,000 license, development, co-development, joint venture, distribution, asset purchase and other arm's-length agreements. Companies, universities and other interested parties use BioSciDB to inspect, analyze, share and enhance best practices in negotiating, structuring, and managing alliances.

BioSci agrees with Respondent's argument that "confidential" should continue to be construed to mean information that is confidential in nature based on objective harm of disclosure. This approach acknowledges that the plain meaning of the term cannot be divined without some reference to context. As such, the best reading of Exemption 4's statutory language is that it requires a showing of likely competitive harm upon disclosure. Thus, BioSci requests that the Court, if it reaches the question of Exemption 4, decline to grant Petitioner's request for a construction of the term "confidential" that is disconnected from actual adverse consequences to a business or its competitive position.

ARGUMENT

I. BioSci Relies Upon Current FOIA Jurisprudence and Practice in Conducting Its Business.

BioSci is heavily reliant upon FOIA requests to obtain more complete and accurate historical data to populate BioSciDB. BioSci files approximately 30 FOIA requests per week, 52 weeks per year.

BioSci's process for gathering transaction information includes several distinct steps. First, by monitoring press releases, BioSci identifies an announced or completed arms-length BioPharma relationship or transaction, such as a license, acquisition, or supply agreement. BioSci then collects public statements on the transaction, including SEC-filed contracts which are often redacted. BioSci subsequently requests through FOIA unredacted or less-redacted versions of what was earlier filed.

Of approximately 25,000 discrete SEC-filed contracts currently in BioSciDB, 5,500 (22%) were filed unredacted, 9,300 (38%) were filed redacted, and 9,900 (40%) were obtained via FOIA requests. Not counting amendments and acquisitions, BioSciDB presently contains approximately 16,000 discrete SEC-filed contracts covering de novo arms-length relationships. Of these, 2,700 (16%) were field unredacted, 6,400 (39%) were filed redacted, and 7,200 (44%) were obtained via FOIA requests.

Thus, in the absence of a functional FOIA process for the eventual release of contract data initially designated as confidential, 75-80% of BioPharma deals would be known on the basis of incomplete disclosure only. By contrast, with FOIA functioning as it currently does, approximately 60% of all deals are accessible for analysis based on full disclosure.

Given the importance of FOIA requests to BioSci, a change in the law with the effect of broadening the scope of exemption 4 would materially interfere with BioSci's work.

II. The BioPharma Industry Benefits from Access to the Important Historical Data Provided by BioSci's FOIA Requests.

The business prospects and research pipelines of BioPharma companies face substantial uncertainty due to the inherent risks and substantial costs associated with new drug development projects, including human testing,[4] regulatory approval and competitive positioning In addition, the biopharmaceutical research and development process often lasts a decade or more.[5]

These attributes mean that companies hoping to be successful in the BioPharma space must raise large amounts of capital over an extended period of time. The liquidity necessary for these huge projects, and indeed a vibrant capital markets system generally, requires transparency. Some industry observers have credited the open disclosure system within the U.S. as a rationale for the number of industry-leading companies based in the U.S. Relatedly, a factfinding group in the UK found that its biotechnology sector

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[4] *See* J. DiMasi, H. Grabowski, R. Hansen, Innovation in the Pharmaceutical Industry, 47 J. of Health Econ. 20, 23 (2016) ("The industrial R&D process is marked by substantial financial risks, with expenditures incurred for many development projects that fail to result in a marketed product.").

[5] J. DiMasi, R. Hansen, H. Grabowski, *The Price of Innovation: New estimates of Drug Development Costs*, 22 J. of Health Econ. 151, 153 (2003).

lacked vibrancy in large part due to lack of transparency and a cultural bias in favor of secrets.

Without the detailed historical industry information made available by BioSciDB through consistent FOIA requests, investors and participants in BioPharma transactions would 1) make less informed decisions, possibly on the basis of misleading information; and 2) pursue less desirable information access alternatives.

A. The FOIA Process As Presently Administered by the SEC Advances the Securities Laws' Goals of Disclosure, and Operates as an Important Check on False Press Releases.

Given the aforementioned attributes—extreme expense, length, and uncertainty—the drug development industry is heavily reliant on large-scale investment from a variety of public and private sources. Thus, the securities laws are of particular importance, as companies typically must raise funds both initially and also periodically throughout a project. U.S. securities laws "put the burden of telling the whole truth on the seller"[6] and, of course, emphasize "disclosure, again, disclosure, and still more disclosure."[7] Market efficiency requires accuracy.

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[6] A. Schlesinger, Jr., The Coming of the New Deal 441 (1958) (quoting Franklin D. Roosevelt asking Congress for new securities laws in 1933).

[7] L. Loss, Securities Regulation 21 (2d ed. 1961).

In particular, BioPharma press releases are often the subject of securities enforcement and lawsuits.[8] BioPharma companies are known to push the limits of disclosure laws, perhaps because of the high-risk and capital-intense nature of the business.[9] In short, executives face ongoing extreme pressure to promote the technology to investors. Without the influx of capital accompanying aggressive promotion, the technology—regardless of scientific promise—will die on the vine (as 90% of projects do).

Certainly, as to SEC-filing companies, the SEC receives access to the unredacted filings which contain information that may undermine a corporate statement. However, the SEC does not have unlimited resources. Furthermore, other actors—including state regulators, shareholders, industry watchers, stock analysts and even competitors—all regularly play roles in addressing possible misstatements. For

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[8] *E.g.*, SEC Press Release No. 2018-199 (Sept. 18, 2018) (describing penalties imposed on Colorado-based biopharmaceutical company because company press releases and other investor communications "stated that drug was effective 60 percent of the time, far higher than suggested by actual results available internally").

[9] *See* A. Schuhmacher, O. Gassmann, M. Hinder, Changing R&D Models in Research-based Pharmaceutical Companies. 14 J. of Translational Med. 105, 105-07 (describing the law success rates and high costs of drug projects).

instance, shareholders—often the most attentive of any of the foregoing—can bring private actions under both federal[10] and state securities regimes.[11] Thus, where information is more available, and more particularly where corporate actors know that true information is likely to be made available to a wider audience—then those corporate actors will act with a heightened awareness of the risks of inadequate, false or misleading disclosure.

B. Where FOIA Access is Weakened, BioPharma Industry Actors Will Increase Reliance on Alternative Confidential Information Providers Including Lawyers and Investment Bankers.

If BioSci's FOIA access opportunities to key historical data are undermined in the manner proposed by Petitioner, the BioPharma industry would lose an important information source. No doubt, the industry would adapt. The most likely adaptation would be enhanced importance, and evolved roles, of

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[10] *E.g., Superintendent of Ins. of State of N. Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n. 9 (1971) ("It is now established that a private right of action is implied under s 10(b).")

[11]; *E.g.*, Utah Code Ann. § 61-1-1; Utah Code Ann. § 61-1-22; *Gohler v. Wood*, 919 P.2d 561, 565 (Utah 1996) (holding that Utah Code Annotated § 61-1-22 "creates an express private cause of action for violations of section 61-1-1(2).").

the "Secret Priesthood"—law firms and investment banks with access to industry secrets that serve as advisors to various companies within the BioPharma Industry.

These advisors of course already act as an existing information source. Part of their client pitch—sometimes subtle, sometimes less so—is that they advised on prior deals and thus have insight into confidential historical data as to what constitutes "market" on a given deal term. While express conveyance of prior client confidential data to a current client would violate professional ethics,[12] some conveyances may operate in a less-than-express manner that may not violate professional rules. Furthermore, even where conveyances are proscribed by professional rules, violations may never be discovered.

The expertise, experience and importance of such professionals is obviously valuable. However, if the primary rationale for using such professionals is to utilize their inevitable knowledge of confidential data from prior clients and prior transactions—because that data is not available anywhere else—that

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[12] *See, e.g.*, Canon 4, ABA Code of Professional Responsibility ("A lawyer should preserve the confidences and secrets of a client."); *see also* New York State Rules of Professional Conduct, Rule 1.6 (McKinney 2019) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless [listing specific exceptions.]"

rationale places stress on significant ethical and professional boundaries.[13]

III. Existing Exemption 4 Practice Operates a Reasonable Balance for Competing Interests

Under Exemption 4, and the implementing rules and regulations, SEC filers are entitled to a reasonable process that provides an opportunity for the filer to seek and obtain, through sequential applications, time-unlimited protection of confidential information. At the same time, the system also allows for the presumptive expiration of the confidentiality designation, which ultimately benefits the entire industry.

Pursuant to the SEC's FOIA regulations, a reporting company "can request that the information not be disclosed pursuant to a request under the [FOIA] . . . for reasons of personal privacy or business confidentiality, or for any other reason permitted by Federal law."[14] The SEC's regulations further establish a balanced process for consideration of "confidential treatment requests." This process includes: opportunities for the reporting company to submit a written sub-

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[13] *See, e.g., Med. Diagnostic Imaging v. CareCore Nat.*, 542 F. Supp. 2d 296, 315 (S.D.N.Y. 2008) ("The principle way in which the integrity of the adversary process can be undermined, in the context of a violation of Canon 4, is by the use of a former client's confidences to the new client's advantage.").

[14] 17 C.F.R. § 200.83(a), (c).

stantiation of the request; preliminary decisions communicated from the Commission's Office of FOIA Services; opportunities for supplemental arguments with respect to the preliminary decision, and a final decision from the Office of FOIA Services.[15] Furthermore, the SEC provides for both an internal appeal process and judicial review.[16]

In practice, the current regime does not appear to be unfairly weighted in favor of requesters like BioSci. SEC-reporting companies have straightforward opportunities under the implementing regulations and rules to oppose a FOIA request, and to submit requests to extend the applicable time frame for confidential treatment. As one example, BioSci submitted a FOIA request for an unredacted Form 10-Q filed by Immunogen, Inc. on May 7, 2009. This 10-Q included as an exhibit redacted amendments to a 2000 License Agreement with Genentech.[17] The license agreement related to a drug eventually approved as the breast cancer treatment, Kadcyla. For years after the 2009 filing, pursuant to SEC Rule 24b-2, Immunogen submitted multiple applications to the SEC requesting continuing confidential treatment for the information excluded from the license agreement. In response to

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[15] 17 C.F.R. § 200.83.

[16] 17 C.F.R. § 200.83(d),(e); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979).

[17] ImmunoGen, Inc., Quarterly Report (Form 10-Q), Exh. 10.1 (May 7, 2009).

these applications, the SEC first extended the confidentiality timeline through May 9, 2012, then again through February 8, 2019, and then again through February 8, 2026.[18] This one example shows that companies with supportable concerns about confidentiality are able to continue to keep certain information confidential. However, at least under the existing law, for each extension, it may be presumed that Immunogen presented the SEC with some substantiation for its request for continuing confidential treatment.

In short, changing the construction of the statutory term "Confidential" appears to be an unnecessary shift in favor of the SEC-filer, particularly given that as shown in the example above, an SEC filer already has sufficient tools to interact with the SEC and make a case for ongoing protection of confidential information with ongoing relevance. Furthermore, where such information is made public, in the vast majority of cases there is no competitive harm because the specific relevance of the information has expired. Yet as shown by BioSci, that information can be marshaled

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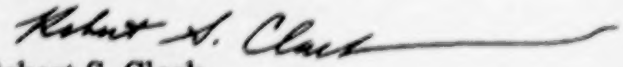
[18] June 25, 2009 SEC Order Granting Confidential Treatment Under the Securities Exchange Act of 1934, ImmunoGen, Inc., File No. 000-17999 CF No. 23628; May 8, 2012 SEC Order Granting Confidential Treatment Under the Securities Exchange Act of 1934, ImmunoGen, Inc., File No. 000-17999 CF No. 27869; March 18, 2019 SEC Order Granting Confidential Treatment Under the Securities Exchange Act of 1934, ImmunoGen, Inc., File No. 000-17999 CF No. 37158.

as part of industry data to enhance the functioning of an important industry.

CONCLUSION

Adopting the Petitioner's proposed definition of "Confidential" would adversely affect the BioPharma Industry. BioSci fills an important niche in the BioPharma consulting space because of its extensive knowledge of historical biopharmaceutical deal terms. BioSci helps its clients understand the marketplace and make more informed decisions, and BioSci's services are dependent upon the existing well-balanced FOIA regime. For these reasons, important policy objectives for public reporting companies will be served by this Court continuing to follow its prior admonitions that FOIA Exemptions be construed narrowly. Thus, to the extent the Court reaches the issues involving construction of Exemption 4, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,



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March 25, 2019

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* CAUSE OF ACTION INSTITUTE, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, FOIA ADVISOR, OPEN THE GOVERNMENT, AND PROJECT ON GOVERNMENT OVERSIGHT, IN SUPPORT OF RESPONDENT

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March 22, 2019

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Respondent on its own behalf and on behalf of co-*amici*.[1]

INTEREST OF *AMICI CURIAE*

CoA Institute is a 501(c)(3) nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public about how government accountability, transparency, and the rule of law protect individual liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, among other things, appearing as *amicus curiae* before this and other courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute brief); Br. of *Amicus Curiae* CoA Inst., *Inst. for Justice v. Reilly*, No. A19A0076 (Ga. Ct. App. filed Oct. 23, 2018) (presenting court with fifty-state survey of state open records laws).

CoA Institute has a particular interest in the proper application of the Freedom of Information Act ("FOIA") because it is the primary tool that CoA

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[1] All parties have consented to the filing of this brief via blanket consent. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to this brief.

Institute uses to conduct government oversight. The proper application of FOIA's statutory exemptions is one of the most important issues related to FOIA administration. For that reason, CoA Institute has a strong interest in this case and the Court's determination of the scope of Exemption 4.

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue code. CREW seeks to promote accountability, transparency, and integrity in government officials and the government decision-making process. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and empowering citizens to have an influential voice in government decisions through the dissemination of information, including information CREW obtains through the FOIA. Toward that end, CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW's public interest litigation includes lawsuits brought against the Executive and executive branch agencies to prevent abuses of executive power.

FOIA Advisor is an online, noncommercial forum designed to help the public learn about the federal FOIA. Its staff answers questions about FOIA-related topics, highlights news developments of interest to the FOIA and transparency communities, compiles and opines on new opinions in FOIA cases, and publishes commentary on issues concerning public access to government information.

Open the Government ("OTG") is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. As the coordinating hub of a coalition of more than 100 public-interest organizations, OTG leads efforts to pass critically needed reforms to the FOIA and defends against efforts to weaken and violate the law. OTG works with coalition members to file FOIA requests for records on government decision-making and believes that ensuring public access to information is essential to hold our public officials accountable at all levels of government.

Founded in 1981, the Project On Government Oversight ("POGO") is a nonpartisan independent watchdog that champions good government reforms. POGO investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. And, in doing so, it relies on the FOIA. POGO has found that in many cases, the concealment of government records has to do with hiding corruption, intentional wrongdoing, or gross mismanagement by the government or its contractors. POGO strongly believes that sunshine is the best disinfectant, and that it must empower citizens with information and tools to hold a local, state, or federal government accountable.

SUMMARY OF ARGUMENT

The FOIA exempts "confidential" commercial or financial information that the government obtains from a person from disclosure. But the FOIA does not define "confidential." The term's meaning cannot be derived from bare dictionary definitions. "Confidential" instead must be understood in light of its historical usage in other legal contexts and elsewhere in the FOIA. Persuasive canons of statutory interpretation counsel the Court to take that approach. Petitioner's overbroad reading of "confidential" ignores legal history, deviates from the interpretative methodology accepted for other terms in Exemption 4, and would render it surplusage by swallowing up the independent meanings of "trade secret" and "privileged."

The proper meaning of "confidential" covers information that, if made public, would cause competitive harm to its source. This meaning is rooted in the common law and the nature of confidential relationships. But history is not the only basis for this understanding. In other legal contexts, construing the phrase "confidential information" frequently involves some form of harm analysis. From judicial records and the Bankruptcy Code, to the Rules of Civil Procedure and this Court's precedents on FOIA Exemptions 5 and 7, legal context demonstrates that Petitioner's approach is incorrect.

This case also presents the Court with an opportunity to clarify other aspects of Exemption 4.

Although *amici* ask the Court to uphold the competitive-harm justification of *National Parks*, they also ask the Court to eliminate the government-impairment justification, abandon the distinction between information submitted voluntarily or under compulsion, reiterate that competitive harm must be analyzed under an objective test, and accept reputational harms that impact competitive standing as cognizable under Exemption 4.

As the Court considers this case, it should do so consistent with its precedents. The Court has recognized that the FOIA is essential to "ensure an informed citizenry, vital to the functioning of a democratic society," *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (citation omitted), and that it contains a "strong presumption in favor of disclosure[.]" *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). FOIA exemptions "must be 'narrowly construed'" to ensure that citizens have access to information and to honor the strong presumption of disclosure. *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (citation omitted).

ARGUMENT

I. The Court should interpret the term "confidential" in Exemption 4 in harmony with the statutory text and its historical usage in other legal contexts.

Exemption 4 protects from disclosure "commercial or financial information obtained from a person and . . . confidential[.]" 5 U.S.C. § 552(b)(4). Although

Congress did not define "confidential," it is not self-evident that it intended the term to carry a bare dictionary definition. On the contrary, persuasive canons of statutory construction, as well as the other contexts in which "confidential" is a legal term of art, counsel against a generalized interpretation.

This Court should construe the term "confidential" to include information that, if made public, would likely cause competitive harm to its source. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) [hereinafter *Nat'l Parks*] ("[C]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . to cause substantial harm to the competitive position of the person from whom [it] was obtained.").

A. Three canons of construction counsel against using Petitioner's overbroad interpretation of "confidential."

Unless a term is statutorily defined, it is "a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citation omitted). But words do not exist in isolation and the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Three canons of statutory

construction counsel against using an overbroad, ordinary-meaning construction here: the surplusage, associated-words, and legal-meaning canons.

(1) The surplusage canon: The surplusage canon teaches that, whenever possible, courts should interpret statutes so that all the words are given effect, and none are rendered meaningless. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting.") (cleaned up). Although "[t]he canon against surplusage is not an absolute rule," it has special force "where a competing interpretation gives effect to every clause and word of a statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (citation omitted). Here, *amici* provide the Court with an interpretation that gives effect to every word and clause of Exemption 4, whereas Petitioner's interpretation of "confidential" would render the rest of the exemption nearly meaningless.

Exemption 4 allows agencies to withhold information if it meets one of three statutory bases: it must be a (1) trade secret, or commercial or financial information that is either (2) privileged or (3) confidential. Petitioner asks the Court to interpret "confidential" to mean "something kept private and not publicly disclosed." Pet. Br. 16. But doing so would read "trade secrets" and "privileged" out of the statute. Why? Because all trade secrets and privileged information are "kept private and not

publicly disclosed." They are both "confidential" in Petitioner's broadest dictionary sense.

For example, both a company's secret drug formula (trade secret) and attorney-client communications (privileged) are private, intended to be kept secret, and not ordinarily publicly disseminated, thus meeting Petitioner's definition of "confidential." If that interpretation were correct, there would have been no reason for Congress to include "trade secret" or "privileged" in Exemption 4; it simply could have said "confidential." *See In re Orion Pictures Corp.*, 21 F.3d 24, 28 (2d Cir. 1994) (disclosure exemption in bankruptcy code "carefully drafted to avoid merging 'trade secrets' with 'confidential commercial information'"). But that is not what Congress did. Exemption 4 must be interpreted so that "trade secret" and "privileged" mean something different than "confidential."

In its petition for a writ of certiorari, Petitioner argued that the D.C. Circuit's interpretation of "confidential" according to the *National Parks* competitive-harm test led it to later interpret "trade secrets" in a narrow way to avoid reading "trade secrets" out of Exemption 4. Pet. 20–21. Petitioner is correct that the D.C. Circuit's decisions in *National Parks* and *Public Citizen* avoided any surplusage problem. But now Petitioner asks this Court to upset the applecart and introduce an even graver surplusage problem than the one the D.C. Circuit originally avoided. Petitioner's failure to discuss the surplusage canon in its merits brief is telling.

Amici propose to retain the *National Parks* competitive-harm test and, by doing so, create three distinct, if slightly overlapping, spheres of protected information. *Amici*'s approach would retain the comparatively easy test for "trade secrets"—that is, the test adopted in *Public Citizen*—while requiring a greater showing to invoke the "confidential" prong.

First, under *amici*'s interpretation, a trade secret would be exempt from disclosure if an agency could show that it is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983) [hereinafter *Pub. Citizen*]. This prong of Exemption 4 protects a smaller universe of information but does so without a competitive-harm showing. The evidentiary showing is fully internal to the company; no market-impact analysis would need to be conducted.

Second, privileged commercial or financial information, such as attorney-client communications, would be exempt from disclosure regardless of whether it is a trade secret or if disclosure would cause competitive harm, thus giving independent effect to the second prong of Exemption 4.

Third, "confidential" would encompass any remaining information that, if disclosed, would cause its source competitive harm. This universe of

commercial or financial information is broader than both "trade secrets" and "privileged" information but requires a relatively more-difficult showing.

Thus, *amici* provide the Court with an interpretation that gives all three statutory terms independent applications and tests, none of which render the others meaningless. Petitioner's interpretation cannot perform this basic task of statutory interpretation. Instead, Petitioner turns Exemption 4 analysis into a one-trick pony: was the information meant to be kept secret? The surplusage canon cannot bear that much statutory invalidation. *See Marx*, 568 U.S. at 385 (canon especially important "where a competing interpretation gives effect to every clause and word of a statute").

(2) The associated-words canon: The associated-words canon (*noscitur a sociis*) teaches that words located near one another in a statute give each other meaning. *See* Antonin Scalia & Bryan Garner, Reading Law 195–98 (2012). Courts apply this canon to "'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

In Exemption 4, "confidential" exists alongside "trade secret" and "privileged," two terms of art that carry specialized legal meanings. *See Pub. Citizen*, 704 F.2d at 1286–90 (exploring complex legal meaning

of "trade secret"); *Wash. Post Co. v. Dep't of Health & Human Servs.*, 690 F.2d 252, 268 n.50 (D.C. Cir. 1982) (noting that "privileged" includes the legal understanding of attorney-client privilege). So too must "confidential" be given its legal meaning to avoid giving it "unintended breadth," *Yates*, 135 S. Ct. at 1085, and to harmonize it with associated words in the same statutory provision.

(3) The legal-meaning canon: Statutes may contain words that are not used according to their common-language dictionary definition but instead carry long-understood legal meaning. When "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning[.]" *Morissette v. United States*, 342 U.S. 246, 263 (1952).

In those situations, courts must avoid "reject[ing] a relevant definition of a word tailored to judicial settings in favor of a more general definition from another dictionary." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 616 (2001). That is, "[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Id.* at 615. When a concept is "transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Scalia & Garner, Reading Law 73 (citing Felix Frankfurter, *Some Reflections on the*

Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); *see* William N. Eskridge Jr., Interpreting Law 60 (2016) (When "Congress is using legal terms of art in laws directing [agency] officials, presumably advised by lawyers, it makes sense to focus on the specialized meaning reflected in legal sources[.]").

Courts can understand legal meaning by consulting previous judicial interpretations, equity, common law, and usage of the same term for the same purpose in other contexts. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1425–26 (2018) (drawing on common-law understanding of "tort"); *Wilkie v. Robbins*, 551 U.S. 537, 563–64 (2007) (same, "extortion"); *Nat'l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (referring to "settled meaning under either equity or the common law"); *Carolene Prod. Co. v. United States*, 323 U.S. 18, 26 (1944) (phrases carry "previous judicial interpretations of the wording") (citations omitted). *But see Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 233–34 (2011) (declining to assume Congress meant to incorporate the meaning of "unavoidable" pulled from a comment to the Restatement (Second) of Torts).

As argued below, the word "confidential" in Exemption 4 draws its meaning from a long-established legal tradition. Congress did not use the word in a common-language dictionary sense, as Petitioner contends, but instead carried over the "old soil" understanding that "confidential information" is exchanged in a confidential relationship and, if disclosed, would cause competitive harm to its source.

B. The legal meaning of "confidential" includes information that, if made public, would cause its source competitive harm.

As argued above, three canons of statutory construction counsel in favor of understanding the term "confidential" according to its specialized legal meaning rather than its bare dictionary definition. To assess a term's legal meaning, courts consult history, common law, and uses of the term in related contexts. *See Jesner*, 138 S. Ct. at 1425–26 (drawing on common-law understanding); *Carolene Prod. Co.*, 323 U.S. at 26 (phrase "carries with it the previous judicial interpretations") (citations omitted). Here, these sources point to an understanding of "confidential information" that includes information that, if disclosed, would cause its source competitive harm.

1. "Confidential information" has historically encompassed materials that would cause injury if improperly disclosed.

The legal understanding of the term "confidential" has its historical roots in the law of confidential relationships, including attorney-client and principal-agent. But the understanding also embraced tort and equity actions for "implied contracts of confidentiality" and "breach of trust and confidence." The common touchstone in these areas is the idea that "confidential information" arises from the duty that attaches when information of a certain character is shared by one party with another. The character of

information that has been protected as "confidential" in these situations is information that, if misused, would injure its source. *See* Resp. Br. 42–48 (discussing material that is "confidential in *nature*").

A small sample of early English cases makes the point. In 1820, an employee stole recipes for veterinary medicines from his employer and used them in his own business to the disadvantage of that employer. *Yovatt v Winyard*, 37 E.R. 425 (1820 Ch.). The Lord Chancellor granted an injunction against their use based on a "breach of trust and confidence." *Id.* Similarly, in 1825, a pupil attending a surgeon's lectures was found to have entered into an implied contract not to transcribe and publish the lectures' content. *Abernethy v Hutchinson*, 47 E.R. 1313 (1825 Ch.). Joseph Story later noted the principle behind this prohibition was that those granted "admission to hear such lectures [do so] upon the implied *confidence* and contract, that the hearer will not use any means *to injure*, or to take away the exclusive right of the lecturer in his own lectures." Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 137 (2007) (citing 2 Joseph Story, Commentaries on Equity Jurisprudence: As Administered in England and America 264 (3d rev., corrected, and enlarged ed. 1843)) (emphasis added); *see also Prince Albert v Strange*, 64 E.R. 293 (1849 Ch.) ("A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it.").

The English examples in this area are nearly endless but the cited cases exemplify the law's recognition of the duty that arises when confidential information moves from its original source to another person, regardless of whether that duty is explicit, or the information is subject to formal intellectual-property or contractual protections.

This understanding was translated into American law as well. For example, the Supreme Judicial Court of Massachusetts has acknowledged that an employee is "restrained from making use of *confidential information* which he has gained in the employment of some other person [because] there is . . . an implied contract on the part of the employé that he will not . . . use [that] information . . . *to the detriment* of his former employer." *Essex Tr. Co. v. Enwright*, 102 N.E. 441, 442 (Mass. 1913) (citing *Robb v. Green*, 2 Q. B. 1 (1895)) (emphases added); *see also Stevens & Co. v. Stiles*, 71 A. 802 (R.I. 1909) (finding an employee may not surreptitiously collect customers names and addresses and solicit them to use his services instead).

This Court too has recognized that the foundations of confidential information are cemented in the relationship in which the information arose, the character of that information, and the duty the recipient takes on when receiving it. As early as 1917, the Court wrote that when a "defendant stood in *confidential relations* with the plaintiffs . . . the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. . . . If there is any disadvantage in the fact that he knew

the plaintiffs' secrets, *he must take the burden* with the good." *E. I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (emphases added). That is, because the parties were in a confidential relationship, the defendant had a duty not to use the plaintiffs' secrets to their disadvantage. The Court's reasoning in *Masland* has informed its later treatment of confidential information in other contexts, including the FOIA. *See Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979) (noting "courts have long recognized a qualified evidentiary privilege for . . . confidential commercial information" when discussing the scope of FOIA Exemption 5) (citing *Masland*); *Becher v. Contoure Labs.*, 279 U.S. 388, 391 (1929) (noting that claim for "wrongful disregard of confidential relations" arises "independent of the patent law") (citing *Masland*).

This understanding of "confidential information" — information shared in a confidential relationship that would cause harm to its source if it is disclosed or misused—has been extended in other statutory and non-statutory contexts as well.

2. Courts apply some form of harm analysis to protect "confidential information" in modern contexts.

Today, the concept of "confidential information" arises in a number of contexts, including: access to judicial records, bankruptcy court records, protective orders in civil discovery, Exemption 5's confidential-

commercial-information privilege, and Exemption 7's protection of law enforcement records. *Cf.* Resp. Br. 43–51. The rule against disclosure arises when a source entrusts information to the care of another and would be harmed by its disclosure.

Judicial Records: The common-law right of public access to judicial records contains an exception for commercial information that would cause competitive harm. In *Nixon v. Warner Communications, Inc.*, this Court made "clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." 435 U.S. 589, 597 (1978). Like the FOIA, the interest behind that right is "the citizen's desire to keep a watchful eye on the workings of public agencies and in a newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 598 (citations omitted). But that right is, of course, not absolute and one limitation is for "sources of business information that might harm a litigant's competitive standing." *Id.* (citing *Schmedding v. May*, 48 N.W. 201, 202 (Mich. 1891)) (showing concern about releasing materials that would affect a litigant's "financial standing").

Bankruptcy Court: Similarly, in the bankruptcy context, Congress created a statutory right of access to papers filed with a bankruptcy court. *See* 11 U.S.C. § 107. But Congress devised an exemption to protect "trade secret[s] or confidential research, development, or commercial information[.]" *Id.* § 107(b)(1). Courts

view "confidential" in the Bankruptcy Code as protecting "information which would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.'" *In re Orion Pictures Corp.*, 21 F.3d at 27 (citing *In re Itel Corp.*, 17 B.R. 942, 944 (B.A.P. 9th Cir. 1982)); *see In re Glob. Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003) (protecting against disclosure that could "reasonably be expected to cause the entity commercial injury"). This focus on "unfair advantage" and "commercial injury" mirrors concerns about "competitive harm" in other areas.

Civil Discovery: The same understanding is reflected in Federal Rule of Civil Procedure 26(c), which governs protective orders restricting access to discovery materials. One of the bases for the good-cause showing necessary to obtain a protective order is to ensure "that a trade secret or other *confidential* research, development, or commercial information not be revealed[.]" Fed. R. Civ. P. 26(c)(1)(G) (emphasis added). That standard is met when "a party's interest in *confidential* commercial information . . . [faces] a sufficient threat of *irreparable harm*." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (citation omitted) (emphasis added); *see Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (asking if disclosure would cause "cognizable harm sufficient to warrant a protective order").

FOIA Exemption 5: This Court already has seen the importance of the competitive-harm principle and

adopted it in the FOIA context. In *Federal Open Market Committee v. Merrill*, the Court held that "Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract[.]" 443 U.S. at 360. The basis of that privilege, the Court reasoned, is not to protect the free exchange of information within agencies, as has been relied upon for other Exemption 5 privileges, but rather that "the Government will be placed at a *competitive disadvantage* or that the consummation of the contract may be endangered." *Id.* (emphasis added); *see id.* at 363 (protecting records because of "the harm that would be inflicted upon the Government by premature disclosure," and because "immediate release . . . would significantly harm the Government's . . . commercial interests" and "give unfair advantage"). Lower courts have adhered to this Court's direction that the harm principle "should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege." *Id.*; *see Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 518 (D.C. Cir. 1996); *Gov't Land Bank v. Gen. Servs. Admin.*, 671 F.2d 663, 665–66 (1st Cir. 1982); *Taylor-Woodrow Int'l v. Dep't of Navy*, No. 88-429, 1989 WL 1095561, at *3 (W.D. Wash. Apr. 5, 1989).

In a dissent from a denial of a petition for a writ of certiorari, two members of the Court expressed concern about a "disconcerting anomaly" that "confidential" in Exemption 4 and the government's confidential-commercial-information privilege under

Exemption 5 were not coterminous. *N.H. Right to Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 383, 385 (2015). That concern is misplaced. Both exemptions protect information that would cause competitive harm if disclosed. The difference in application is because Exemption 5's confidential-commercial-information privilege protects information generated by government, while Exemption 4 protects information "obtained from a person." 5 U.SC. § 552(b)(4); *Merrill* 443 U.S. at 360 (noting different applications because Exemption 4 is "limited to information 'obtained from a person,' that is, to information obtained outside the Government.").

FOIA Exemption 7: This Court also has adopted a harm-based approach in interpreting "confidential" under Exemption 7, which protects law enforcement records that "could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis," or that contain "information furnished by a confidential source" during a "lawful national security investigation." 5 U.S.C. § 552(b)(7)(D). Once again, the concept of "confidential information" arises in the context of a relationship and the duty that attaches when information is exchanged.

In *Department of Justice v. Landano*, the Court rejected a broad common-usage meaning of "confidential" and instead construed the term in light of the unique expectations that arise when individuals provide vital information to law enforcement authorities. 508 U.S. 165, 174 (1993) ("A source

should be deemed confidential if [it] furnished information with the understanding that the [government] would not divulge the communication except to the extent necessary for law enforcement purposes."). The same contextual approach proves useful in understanding Exemption 4.[2]

Under Exemption 7(D), "the question is not whether [a] requested *document* is of the type that [an] agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *Id.* at 172. The exemption applies whenever disclosure is likely to harm a source's expectation of anonymity. Outside of an express promise of secrecy, that expectation is not "inherently implicit," as the government argued in *Landano*, *id.*

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[2] The parallels between *National Parks* and *Landano* are compelling. In analyzing the "dual purpose" of Exemption 4, the D.C. Circuit—perhaps unknowingly—drew a connection between the government's interest in collecting "commercial and financial data" and the possible existence of an implied assurance of confidentiality. *Nat'l Parks*, 498 F.2d at 767–68 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[.]"). Thus, the relationship of confidence created when sensitive commercial or financial information is given to the government is similar to the relationship between a law enforcement official and informant. In both cases, the source providing information expects secrecy given the harm that would occur from any violation of confidence by the other party. *Cf. infra* § II.A (discussing relationship between competitive disadvantage from disclosure and impairment of government information collection).

at 174, but is established on an "individualized" basis by examining several factors, including (a) whether a source was a "paid informant," (b) the "nature of the source's ongoing relationship" with law enforcement officials, (c) the "character of the crime at issue," and (d) "the source's relation to the crime." *Id.* at 179.

These last two factors reflect how an expectation of confidentiality is founded in a source's fear that he may be harmed if his identity is disclosed. Courts consistently note the danger of bodily harm, invasion of safety, harassment, and retaliation when evaluating the existence of an implied promise of confidentiality. *See id.* at 179–80; *see also, e.g.*, *Massey v. Fed. Bureau of Investigation*, 3 F.3d 620, 623 (2d Cir. 1993) ("*Landano* noted that courts may look to the risks an informant might face were her identity disclosed, such as retaliation, reprisal[,] or harassment[.]"); *accord Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 487–88 (2d Cir. 1999) ("If the identities of the sources . . . were disclosed, they would face an objectively real and substantial risk of retaliation, reprisal or harassment."); *Williams v. Fed. Bureau of Investigation*, 69 F.3d 1155, 1159–60 (D.C. Cir. 1995) (same). At least one court has recognized the relevance of commercial harm under Exemption 7(D). *See Council on Am.-Islamic Relations v. Fed. Bureau of Investigation*, 749 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) ("[D]isclosure of the information would 'likely cause substantial harm to the competitive position of the [informant] companies[.]'").

Petitioner relies on *Landano* but mischaracterizes its holding. *See* Pet. Br. 19–21. This Court recognized the inadequacy of a bare dictionary definition of "confidential," which merely set the farthest limits of its possible meaning. *See Landano*, 508 U.S. at 173 (citing Webster's Third New International Dictionary 476 (1986)). Instead, it looked to common usage and context as a basis for inferring confidentiality. That context, in turn, required examining individualized circumstances. Foremost among these is whether disclosure will cause harm.

* * *

Petitioner's insistence on a simple dictionary definition does not give "confidential" its proper legal meaning. Understood in context—after consulting canons of construction, historical origins, and usage in other contexts—"confidential information" is information that, if disclosed, would cause its source competitive harm.[3] This Court should interpret Exemption 4 in fidelity with that understanding.

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[3] This understanding is further supported by Respondent's recognition of a sliding scale of confidentiality, where information can be more or less confidential, indicating that the magnitude of the harm from disclosure is a relevant consideration. *See* Resp. Br. 46–47.

II. The Court should provide clarity on other aspects of Exemption 4's confidential-information test.

After confirming that competitive harm is the core of the test to withhold information as "confidential," the Court should clean up other elements of the Exemption 4 inquiry. Specifically, the Court should (1) eliminate the *National Parks* government-impairment justification for withholding information as unnecessary and duplicative, (2) abandon the *Critical Mass* distinction between information submitted voluntarily or under compulsion as atextual, (3) confirm that competitive harm is analyzed under an objective test, and (4) recognize reputational harm can be a valid competitive harm.

A. The Court should eliminate the government-impairment justification for withholding information because it is unnecessary and duplicative.

The D.C. Circuit's *National Parks* test for Exemption 4 allows an agency to withhold information as "confidential" if disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks*, 498 F.2d at 770; *see also Sharkey v. Food & Drug Admin.*, 250 F. App'x 284, 288 (11th Cir. 2007) (adopting *National Parks*); *Utah v. Dep't of Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (same). Both of these justifications protect the same sphere of

information and, therefore, it is unnecessary and duplicative to treat them as distinct.

When the D.C. Circuit created the government-impairment justification in *National Parks*, it canvassed the FOIA's legislative history and stated that Exemption 4's "'financial information' exemption recognizes the need of government policymakers to have access to commercial and financial data." 498 F.2d at 767. The D.C. Circuit reasoned that "[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *Id.* Although this may be a legitimate policy concern, there is nothing in the text, history, or contextual usage of "confidential" to support withholding information on that basis.

More importantly, when properly considered, the two justifications in *National Parks* are two sides of the same coin. Because the concept of "confidential information" arises out of the law of confidential relationships, it follows that both parties in that relationship have interests that deserve to be protected. For example, while the master has an interest in his secret formulas not being released, so too does the apprentice have a corresponding interest in being trusted to receive the information without the master fearing its misuse. Without the law's protection of "confidential information," the master will not share it and the apprentice will be worse off. But although the justification can be stated either as

protecting the master from harm or preventing the impairment of the apprentice from receiving it, the sphere of information protected is the same. Thus, there is no need to rely on the impairment prong to justify the protection.

The interests of the parties in a confidential relationship in preserving the flow of information cannot be divorced from the nature of the information being exchanged. Confidential relationships arise precisely because some harm could befall the party providing sensitive information if it were disclosed to the public. And, without a likelihood of harm upon disclosure or misuse, there is no disincentive for sharing sensitive information. As discussed above, this Court's treatment of "confidential" under Exemption 7(D) is helpful in illustrating the principle. *See supra* § I.B.2. An informant has an expectation of confidentiality in his dealings with law enforcement because the disclosure of his identity, or the information he provides, could cause real harm; the government's ability to obtain that information would be impaired if that confidentiality were not respected.

At some level, the *National Parks* court appears to have recognized the interrelation of interests found on each side of a confidential relationship, but it confused the government's interest as entirely distinct and severable. 498 F.2d at 767. That confusion may be based on the D.C. Circuit's inadequate reading of *Soucie v. David*, 448 F.2d 1067, 1078 & 1078 n.46 (D.C. Cir. 1971), which depended on inapposite cases dealing with other aspects of Exemption 4. *See, e.g.*,

Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970) (focusing on whether information has been "obtained from any person"). The *Soucie* court also misread cases that presaged the necessary link between the government-impairment and harm justifications. *See Bristol-Meyers Co. v. Fed. Trade Comm'n*, 424 F. 2d 935, 938 (D.C. Cir. 1970) ("This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers.").

Amici therefore urge the Court to abandon the first justification in *National Parks* and retain the second, with its proper focus on competitive harm. The first interest—"the Government's ability to obtain necessary information in the future," 498 F.2d at 770—is adequately covered by the competitive-harm test. The protection of information that will cause competitive harm to its source operationalizes the term and is true to its historical usage.

B. The Court should eliminate the atextual distinction created in *Critical Mass* between information that is obtained through voluntary or compulsory means.

Nearly twenty years after the introduction of the *National Parks* competitive-harm test, the D.C. Circuit reversed course in part by creating a distinction between information obtained on a *voluntary* basis and information obtained under

compulsion. "In the latter case," the court held, "there is a presumption that the Government's interest [in ensuring the continued submission of information] is not threatened by disclosure because it secures the information by mandate," and therefore an inquiry into the likely harm in disclosure is appropriate. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F. 2d 871, 878 (D.C. Cir. 1992) [hereinafter *Critical Mass*]. But in cases of *voluntary* submission, "the private interest served by Exemption 4 is the protection of information that, for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained[.]'" *Id.* (citation omitted). This lessened standard is entirely atextual and subjective. Neither the plain text of Exemption 4 nor the legal meaning of "confidential" suggest any difference in treatment for voluntarily produced or compelled information. The Court should overrule *Critical Mass* and apply the *National Parks* competitive-harm test in all cases.[4]

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[4] Consider if a CEO emails an agency head to arrange a lunch meeting and, in that email, includes information about a dispute between the company and agency. Under *Critical Mass*, because the CEO voluntarily sent the email, a court would affirm the agency withholding it because emails between CEOs and agency heads are "customarily not . . . released to the public[.]" 975 F.2d at 879. Similarly, under Petitioner's standard, the email would be withheld because it is "something kept private and not publicly disclosed." Pet. Br. 16. But under *amici*'s test, the email could only be withheld if its disclosure would cause the company competitive harm. More likely, a court would require the agency to conduct a segregability analysis and release the portion of the

As an initial matter, the conceptual distinction between voluntary and compulsory submissions is difficult to maintain in application. *See, e.g.*, *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316, 317–18 (D.D.C. 1995) ("[N]o bright line rule exists for determining voluntariness[.]"). In this case, for example, the district court held that the *National Parks* test applied because "SNAP retailers [were] required to disclose EBT data if they want[ed] to be compensated" for accepting food stamps. Pet. App. 67a n.3 (citation omitted). The parties never disputed that choice of test. But it is not entirely clear why, as a categorical matter, a person's *voluntary* participation in a government program, including a welfare benefits compensation scheme, should always entail the *compulsory* submission of commercial or financial information for Exemption 4 purposes, notwithstanding the paperwork or reporting requirements of that program.

To be sure, many courts have recognized that "when the government requires a private party to

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email about the lunch but withhold information describing the dispute. *Cf. Judicial Watch, Inc. v. Dep't of Treasury*, 802 F. Supp. 2d 185, 205–07 (D.D.C. 2011) (allowing agency to withhold portions of "Current Draft Talking Points" shared with it by a company because they were submitted voluntarily, but requiring the agency to conduct a segregability analysis). *Amici*'s approach draws the proper balance between allowing oversight of government activity, including interactions with private entities, and protecting companies from competitive harm that would result from disclosure of their information in government hands.

submit information as a condition of doing business," that submission is "required" for the purposes of *Critical Mass*. *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000). But some courts have taken the opposing view. *See, e.g.*, *Envtl. Tech., Inc. v. Envtl. Prot. Agency*, 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (information provided in response to EPA bid request was submitted voluntarily). And at least three circuits have rejected the *Critical Mass* distinction altogether or deferred its adoption. *See N.H. Right to Life v. Dep't of Health & Human Servs.*, 778 F.3d 43, 52 n.8 (1st Cir. 2015); *Am. Mgmt. Servs., LLC v. Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996).

Critical Mass ultimately obliterates any meaningful distinction between "voluntary" and "compulsory." It also complicates the Exemption 4 analysis for information submissions that contain both voluntary *and* compulsory elements. *See, e.g.*, *Am. Mgmt. Servs., LLC*, 703 F.3d at 731 n.6 ("[T]his case would present a unique circumstance because [the] disclosures . . . have both voluntary and obligatory elements."). In that situation, it is burdensome for submitters, agencies, FOIA requesters, and courts alike to determine the proper standards for withholding. Finally, *Critical Mass* fails to attend to the common-sense distinction between cases when information is submitted as a "condition of doing business with the government"—for example,

providing sensitive business information on a grant application or contract bid—and information collected as part of compliance with generally applicable laws or as a cost of participating in a regulated market.[5]

Yet another criticism of the *Critical Mass* test for "voluntary" submissions is that a subjective standard is required to determine whether information is "customarily" released to the public. Although the D.C. Circuit has insisted that *Critical Mass* is an "objective" approach, 975 F.2d at 879, it is difficult to accept that claim. An objective test would focus on the *nature* of the information at issue to determine its confidentiality. A "customary" test, by definition, is relative and subjective, looking at how an individual person typically treats (or intends to treat) information. The dissenting opinion in *Critical Mass*, authored by then-Judge Ruth Bader Ginsburg, explained the issue this way:

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[5] When government obtains information on a voluntary basis, Exemption 3 may provide a mechanism for withholding. 5 U.S.C. § 552(b)(3) (coving records "specifically exempted from disclosure by statute"); *see, e.g.*, 15 U.S.C. §§ 46(f), 57b-2(f) (limiting FTC disclosure of "material . . . provided voluntarily in place of . . . compulsory process"); I.R.C. § 6103 (limiting disclosure of tax returns or return information); 19 U.S.C. § 1677f (limiting disclosure of foreign-subsidy information designated as proprietary by a submitter); 15 U.S.C. § 3710a(c) (protecting "commercial or financial information . . . obtained" during cooperative research and development).

> [T]he court's slacked test is not "objective" in any sense . . . . No longer is there to be an independent judicial check on the reasonableness of the provider's custom and the consonance of that custom with the purposes of [E]xemption 4 . . . . To the extent that the court allows providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed "subjective[.]"

Id. at 883.

The *Critical Mass* distinction creates an unworkable subjective standard that is difficult to apply, allows businesses to work around the FOIA to frustrate public disclosure, and deviates from the well-established legal meaning of "confidential." The Court should require the same *National Parks* competitive-harm standard for all Exemption 4 cases dealing with "confidential" information.

C. Courts must adopt an objective test for determining the confidentiality of commercial or financial information.

Petitioner's broad definition of "confidential" would require courts to adopt a *subjective* test when applying Exemption 4. *National Parks* and its progeny across the circuits, however, have counseled that "the test for confidentiality is an *objective* one."

Nat'l Parks, 498 F.2d at 766 (emphasis added); *accord GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994), *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016); *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 9 (1st Cir. 1983); *cf. Bristol-Myers Co.*, 424 F.2d at 938.

Petitioner suggests that "confidential" commercial or financial information ought to include anything that is "kept private and not publicly disclosed." Pet. Br. 16. Petitioner even implies that "confidential information" could extend to materials that a person *intended* to keep secret. *See id.* at 21 (discussing pre-*National Parks* caselaw); *see also* Pet. 16, 18 ("Information is confidential if it is . . . 'intended to be held in confidence or kept secret.'"). That approach is at once too broad and too difficult to apply.

Under Petitioner's interpretation of Exemption 4, confidentiality would no longer depend on the quality of the information at issue, or even on how a person used it in fact. Instead, public access to the information would depend on how an individual submitter intended to use it. This is a subjective test that would disrupt fair administration of the FOIA, upset the predictability of Exemption 4's application, and run afoul of congressional intent. *See 9 to 5 Org. for Women Office Workers*, 721 F.2d at 9 (rejecting a test that "would depend solely on the submitter's subjective intent") (citation omitted). Moreover, it would be difficult for courts to test the veracity of

claims about the "confidentiality" of records, or would at least complicate the inevitable trial proceedings.

The objective test and evidentiary standards that have developed post-*National Parks*, on the other hand, form an approach to which this Court should grant its imprimatur as the benchmark for Exemption 4 analysis. *See Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976) [hereinafter *Nat'l Parks II*] ("Confidential" information is protected when "specific factual or evidentiary material" demonstrates that its source "actually face[s] competition" and "competitive injury would likely result from disclosure"). To sustain a withholding under the "confidential" portion of Exemption 4, an agency (or submitter) must demonstrate "both actual competition and a likelihood of substantial competitive injury." *Jurewicz v. Dep't of Agric.*, 741 F.3d 1326, 1331 (D.C. Cir. 2014) (citation omitted).

By contrast, "generalized allegations relating to competitive harm," which lack "any concrete or detailed explanation," should be rejected as inadequate. *Trifid Corp. v. Nat'l Imagery & Mapping Agency*, 10 F. Supp. 2d 1087, 1099 (E.D. Mo. 1998); *see United Techs. Corp. v. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) (finding a showing of harm when "a contractor pinpoint[ed] by letter and affidavit technical information it believe[d] that its competitors c[ould] use in their own operation").

An objective test for Exemption 4 finds strong corollaries in broader FOIA principles, such as the requirement that agencies provide detailed justifications for the use of exemptions. *See, e.g.*, *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (agencies may not rely on "conclusory and generalized allegations"). An objective test with strict evidentiary requirements also follows this Court's direction that an agency bears the burden in sustaining its withholdings. *See* 5 U.S.C. § 552(a)(4)(B); *see also Nat'l Parks II*, 547 F.2d at 679 n.20 ("The party seeking to avoid disclosure bears the burden of proving that the circumstances justify nondisclosure."). Allowing an agency or source of information to sweep records outside the scope of the FOIA based on a subjective standard of intended secrecy would not only allow Exemption 4 to "swallow the FOIA nearly whole," as the Eight Circuit observed, Pet. App. 4a n.4, but it would make Exemption 4 an outlier among its sister exemptions.

D. Exemption 4 should protect against certain types of reputational harm that have a negative impact on competitive standing.

Finally, the Court should provide clarity about whether reputational injury flowing from disclosure of confidential information is a basis for withholding information under Exemption 4. As Justice Thomas explained in his dissent from the denial of writ of certiorari in *New Hampshire Right to Life*, at least two circuits have reached different outcomes on that

question. 136 S. Ct. at 364–85. *Amici* propose that *some* kinds of reputational injury—namely, reputational injuries that will have a demonstrated negative impact on competitive standing—should satisfy the *National Parks* test, assuming the likelihood of competitive harm is demonstrated objectively with adequate, non-conclusory evidence.

Soon after it decided *National Parks*, the D.C. Circuit provided one of its first clarifications on the competitive-harm test by explaining that "parties opposing disclosure need not 'show actual competitive harm,'" but merely "'[a]ctual competition and the likelihood of substantial competitive injury[.]'" *Pub. Citizen*, 704 F.2d at 1291 (citation omitted). In doing so, the court also opined, in a footnote and without elaboration, that "'[c]ompetitive harm should not be taken to mean simply any injury to competitive position, as might flow from . . . *embarrassing publicity*[.]'" *Id.* at 1291 n.30 (citation omitted).

That dictum, without substantive analysis, has been recycled over the years in the D.C. Circuit. *See United Techs. Corp.*, 601 F.3d at 564 ("Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury[.]"); *Occidental Petroleum Corp. v. Sec. & Exch. Comm'n*, 873 F.2d 325, 341 (D.C. Cir. 1989); *CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 & nn. 157–58 (D.C. Cir. 1987). Two other circuits have adopted it. *Watkins v. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1202 (9th Cir. 2011); *Gen. Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

The Second Circuit, by contrast, has rejected *Public Citizen*, and instead recognized that any disclosure of commercial or financial information that is likely to have a reputational harm also can carry negative competitive consequences. *See Nadler v. Fed. Deposit Ins. Corp.*, 92 F.3d 93, 97 (2d Cir. 1996) ("The fact is that release might hinder the commercial success of the development project . . . . This potential harm is not properly characterized as 'political.'"). No other circuit has adopted a similar stance, but the Tenth Circuit considered doing so and left the matter unresolved. *See Utah*, 256 F.3d at 970 n. 2.

At its heart, the *Public Citizen* dictum appears to have been misinterpreted, and courts have run away with the error. The D.C. Circuit was at pains to emphasize that competitive harm must flow "from the affirmative use of proprietary information *by competitors*." *Pub. Citizen*, 704 F.2d at 1291 n.30. That is, *mere* embarrassment or damage to goodwill *based on the fact of disclosure to the public* cannot constitute "competitive harm." But that is not the same thing as categorically discounting the negative economic consequences of reputationally damaging information being released into the public domain, such that the competitive standing of a firm is impacted in a real way. Although it may not have recognized the significance of its own observation, the D.C. Circuit appears to have made this point in a case affirming *Public Citizen*:

> [The] right to an exemption, if any, depends upon the *competitive significance* of whatever information may be contained in the documents, not upon whether its motive is to avoid embarrassing publicity. [An agency's] role, therefore, is not to assess the overall damage, regardless of its nature, that would result from disclosure of [embarrassing information], but rather to determine whether any non-public information contained in those documents is *competitively* sensitive, for whatever reasons.

Occidental Petroleum Corp., 873 F.2d at 341. This language appears to support the approach endorsed by the Second Circuit. The disclosure of information, which at first glance appears only to entail mere "political" or reputational harm, can have "competitive significance."

Amici therefore ask the Court to interpret Exemption 4 to protect against reputational harms that have a demonstrable impact on competitive standing, and which can be proven under the objective standard and evidentiary burdens that are well-established across multiple circuits.

CONCLUSION

The Court should affirm the decision below and construe the term "confidential" in Exemption 4 to include information that, if made public, likely would cause competitive harm to its source. The *National Parks* standard gives effect to the historical and legal meaning of "confidential," as well as the statutory text. Finally, the Court should provide clarity on other aspects of the Exemption 4 test by (1) eliminating the *National Parks* government-impairment justification, (2) abandoning the *Critical Mass* distinction between information submitted voluntarily or under compulsion, (3) reiterating that competitive harm is analyzed under an objective test, and (4) accepting certain reputational harms that affect competitive standing as cognizable under Exemption 4.

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No. 18-481

In the Supreme Court of the United States

FOOD MARKETING INSTITUTE, *Petitioner*

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici's members frequently submit sensitive information to the federal government, either voluntarily; as a condition of obtaining a discretionary government benefit; or under mandatory reporting requirements. Whether such information is subject to public disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is therefore of great importance to *amici* and their members. Accordingly, they have a keen interest in the proper interpretation of FOIA's Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *Id.* § 552(b)(4). As petitioner has explained, the lower courts have adopted an atextual interpretation of Exemption 4, and, in doing so, have created substantial uncertainty regarding the exemption's scope. That uncertainty impedes the ability of businesses to make informed judgments regarding the potential risks of sharing with the government sensitive materials regarding their operations.

INTRODUCTION AND SUMMARY OF ARGUMENT

To function, the government requires information from the governed. Much of that information is "confidential"—*i.e.*, it is held "in confidence" and is "not publicly disseminated." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (*Critical Mass II*) (Randolph, J., concurring) (quoting *Webster's Third International Dictionary* 476 (1981)). FOIA's Exemption 4 protects such information from public release by the government. It provides that FOIA's command to "make [agency] records promptly available to any person" upon request "does not apply to matters that are * * * commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(a)(3)(A), (b)(4). In keeping with the ordinary meaning of its plain language, this provision should allow businesses to share sensitive commercial information freely with the government, safe in the understanding that the information will not be disclosed under FOIA as long as the submitter has not otherwise made the information available to the general public.

As petitioner explains, however, the courts of appeals have turned away from Exemption 4's plain text. Instead, they have held that the party invoking Exemption 4 bears the burden of proving that disclosure "is likely * * * to impair the Government's ability to obtain necessary information in the future" or "to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

That test has no basis in Exemption 4's text, which nowhere refers to the concepts of substantial competitive harm or the government's ability to obtain necessary information. Refocusing lower courts on Exemption 4's plain text is particularly important because the *National Parks* standard has proven to be extraordinarily burdensome and unworkable. Because the rule is not guided by FOIA's text, the courts of appeals have diverged in their interpretation and application of *National Parks*, creating substantial uncertainty regarding Exemption 4's scope. Adding to the uncertainty, *National Parks* requires courts to make disclosure decisions based on forecasts of competitive conditions, which are dynamic and thus subject to rapid, unforeseen changes. For example, the lower courts' decisions here were based on an analysis of competition among brick-and-mortar grocery stores. That analysis does not account for the Department of Agriculture's recent decision to allow online retailers to participate in the Supplemental Nutrition Assistance Program ("SNAP"). That decision fundamentally alters the competitive calculus: It is easier and less costly for online retailers to use store-level SNAP data to target customers because those retailers do not need to undertake the considerable expense of opening physical stores.

The uncertainty created by *National Parks* severely impairs companies' ability to plan their affairs and make informed decisions about whether to voluntarily share sensitive information with the government or participate in programs that mandate disclosure of confidential information to government agencies. If a company does share its information and that information is then the subject of a FOIA request,

the company may be required to expend significant resources to establish that the information's public disclosure would cause substantial competitive harm. By contrast, adhering to Exemption 4's plain language would provide greater predictability and simplify litigation for both parties and courts by focusing the inquiry on the straightforward question of whether the information at issue is "confidential" or instead has been publicly disseminated. Courts should ordinarily be able to answer that question without extensive evidentiary proceedings or expert testimony.

Exemption 4 affects industries as diverse as nuclear waste disposal,[2] banking,[3] real estate development,[4] manufacturing,[5] agriculture,[6] and the importation of certain animals.[7] And the kinds of information that may be at issue in Exemption 4 cases are equally diverse, including among other things: audit reports documenting a corporation's financial position,[8] records of quality inspections at food

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[2] *State of Utah* v. *Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001).

[3] *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 242 (2d Cir. 2006).

[4] *Nadler* v. *FDIC*, 92 F.3d 93, 94-95 (2d Cir. 1996).

[5] *United Techs. Corp. ex rel. Pratt & Whitney* v. *FAA*, 102 F.3d 688, 689 (2d Cir. 1996).

[6] *Lion Raisins, Inc.* v. *USDA*, 354 F.3d 1072, 1076 (9th Cir. 2004), overruled on other grounds by *Animal Legal Def. Fund* v. *USDA*, 836 F.3d 987 (9th Cir. 2016).

[7] *People for the Ethical Treatment of Animals* v. *Dep't of Health & Human Servs.*, 901 F.3d 343, 347-348 (D.C. Cir. 2018) ("*PETA*").

[8] *Sharyland Water Supply Corp.* v. *Block*, 755 F.2d 397, 400 (5th Cir. 1985).

processing facilities,[9] airplane-engine designs,[10] and "detailed intrastate sales information, including the names of purchasers * * * and price terms."[11] The sheer number of businesses affected by *National Parks*, as well as the amount of litigation generated by its application, underscores the significance of this case for the national economy and the importance of interpreting Exemption 4 in accordance with the plain meaning of the text that Congress enacted.

ARGUMENT

I. The Atextual *National Parks* Standard Has Proven Unworkable

Unmoored from FOIA's text, the *National Parks* standard has proven to be unworkable. The courts of appeals routinely diverge on its proper interpretation and application. Much of the disagreement pertains to the showing required to establish that disclosure would cause substantial competitive harm. See Pet. 25-29. Courts of appeals disagree regarding (1) the level of precision with which the party resisting disclosure must establish a particular competitive harm, such as lost market share,[12] (2) the role that

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[9] *Lion Raisins*, 354 F.3d at 1075-1078.

[10] *Pratt & Whitney*, 102 F.3d at 689-690.

[11] *Continental Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 32 (5th Cir. 1975).

[12] See *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 384 (2015) (Thomas, J., dissenting). Compare, *e.g.*, *Utah*, 256 F.3d at 970 (accepting "*potential* economic harm" as sufficient to establish substantial competitive harm), with Pet. App. 5a ("A likelihood of commercial usefulness—without more—is not the same as a likelihood of substantial competitive harm."), and *GC MicroCorp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1114-1115 (9th Cir. 1994) (compelling disclosure despite affidavits from

defining a "relevant market" plays in determining the existence of "competition,"[13] (3) whether competitive harm can be shown based on the possibility of future competition from new market entrants,[14] and (4) whether embarrassment and bad publicity can qualify as cognizable "competitive injur[ies]."[15]

The courts of appeals also disagree over issues unrelated to the existence or non-existence of a substantial competitive harm. For example, *National Parks*' first prong—under which information qualifies as "confidential" if disclosure would likely "impair the

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affected businesses explaining that competitors could use information to "alter their subcontracting strategies to better compete"), overruled on other grounds by *Animal Legal Def. Fund* v. *USDA*, 836 F.3d 987 (9th Cir. 2016).

[13] See *N.H. Right to Life*, 136 S. Ct. at 384 (Thomas, J., dissenting). Compare, *e.g.*, *Watkins* v. *Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011) ("[T]he government needs to show there is actual competition in the *relevant market* and a likelihood of substantial injury." (emphasis added)), with *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015) (declining to "myopic[ally] focus[]" on any one relevant market and instead looking to see whether the information submitter faced actual competition in *any* market).

[14] Compare, *e.g.*, *N.H. Right to Life*, 778 F.3d at 51 (emphasizing that a "potential future competitor could take advantage" of information at issue), with *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (holding that argument regarding future competition was impermissibly "speculative").

[15] See *N.H. Right to Life*, 136 S. Ct. at 384-385. Compare, *e.g.*, *Nadler*, 92 F.3d at 97 (finding a likelihood of substantial competitive harm when requesters sought information to support their opposition of real estate development project), with *Pub. Citizen Health Research Grp.* v. *FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) ("emphasiz[ing] that" competitive harm "should not be taken to mean simply any injury to competitive position, as might flow from * * * embarrassing publicity" (citation omitted)).

Government's ability to obtain necessary information in the future," 498 F.2d at 770—has also generated disagreement among the courts of appeals. Some courts have adopted a "program effectiveness" test, which allows the government to withhold information when doing so "serves a valuable purpose and is useful for the effective execution of [an agency's] statutory responsibilities." *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983); see also *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 830 F.2d 278, 286-287 (D.C. Cir. 1987) (*Critical Mass I*). But others have rejected that test, concluding it "would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150-151 (2d Cir. 2010) (citing *Fed. Open Market Comm'n of Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

Most striking of all, the courts of appeals have failed to even decide definitively when *National Parks* applies. Almost two decades after handing down the decision, the D.C. Circuit was still grappling with its consequences in 1992. See *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (*Critical Mass III*). After granting rehearing *en banc* to reconsider *National Parks*, the D.C. Circuit declined to overrule that decision, but instead imposed an atextual limitation on its atextual test, "confin[ing] [the *National Parks* standard] to information that persons are *required* to provide to the Government," explaining that voluntarily submitted information should be "treated

as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public." *Id.* at 872 (emphasis added).

To date, only the Tenth Circuit has embraced the D.C. Circuit's distinction between voluntary and involuntary submissions. See *Utah*, 256 F.3d at 969. Other circuits have sidestepped the question, depriving the government and private litigants of guidance on whether their disputes will be subjected to the *National Parks* test. See, *e.g.*, *N.H. Right to Life*, 778 F.3d at 52 n.8; see also *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Am. Mgmt. Servs., LLC* v. *Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Frazee* v. *Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996).

These splits are powerful evidence that the *National Parks* standard is unworkable and that this Court should refocus lower courts' attention on Exemption 4's plain text. The Department of Justice's *Guide to the Freedom of Information Act* offers a particularly stark illustration of just how much courts have struggled in attempting to apply *National Parks*. See Department of Justice, *Guide to the Freedom of Information Act*, http://bit.ly/2BhLA9Q ("*Guide*"). Although the *Guide* addresses some exemptions in fewer than ten pages, it spends 94 pages and 552 footnotes describing the fractured case law addressing Exemption 4. *Guide*, "Exemption 4," at 263-356. The *Guide*'s discussion of the meaning of the word "confidential" under *National Parks* comprises the bulk of that material, with 79 pages and 478 footnotes devoted to the subject. *Id.* at 273-352. This extensive treatment was necessary to address the multitude of

divergent outcomes yielded by the vague, extratextual and fact-intensive *National Parks* test.

An interpretation consistent with the statute's ordinary meaning would promote greater clarity, as evidenced by the *Guide*'s discussion of the word "confidential" under Exemption 7(D). There, "confidential" is discussed in a comparatively crisp 23 pages and 80 footnotes. *Guide*, "Exemption 7(D)," at 6-21, 27-33. That relative concision is possible because of this Court's holding in *Department of Justice* v. *Landano*, 508 U.S. 165 (1993), that the word "confidential" should be given its ordinary meaning. *Id.* at 173-174. A similar holding in the context of Exemption 4 would promote administrability and clarity in the law. The greater predictability that would result from a text-based approach would be highly "valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010) (citing *First Nat. City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)).

II. *National Parks* Is Extraordinarily Burdensome

The *National Parks* test has also imposed substantial burdens on courts and litigants. The government and the private party resisting disclosure must devote significant time and resources to amass the evidence—often including costly and time-consuming expert testimony—that is required to bear their burden of establishing that disclosure would cause substantial competitive harm. See 5 U.S.C. § 552(a)(4)(B); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 679 n.20 (D.C. Cir. 1976). This

evidentiary burden is taxing even for the government, whose resources are vast.[16] The burden on private parties, particularly small businesses, is significantly greater.[17] In fact, it is likely that the evidentiary burden of *National Parks* deters many small businesses and other private parties from even pursuing meritorious litigation to shield their sensitive information.

When litigation ensues, trial courts are burdened as well. They must devote time to resolving factual disputes—which may necessitate lengthy evidentiary hearings—even though other kinds of "FOIA cases are typically and appropriately decided on motions for summary judgment." *Harrison* v. *Exec. Office for U.S. Attorneys*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005); see also *Miscavige* v. *IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."); *World Pub. Co.* v. *Dep't of Justice*, 672 F.3d 825, 832 (10th Cir. 2012) (similar).

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[16] The Department of Agriculture's decision here to acquiesce in the district court's decision rather than pursue an appeal illustrates how the *National Parks* test risks deterring government agencies from vigorously resisting the release of confidential commercial information. See Pet. 7. By substantially increasing the burdens of FOIA litigation, *National Parks* creates the risk that agencies will determine that Exemption 4 litigation is too costly or difficult to be worth pursuing.

[17] See, *e.g.*, *Sharyland*, 755 F.2d at 398-399 (in which a nonprofit "rural water supply corporation," owned by its 5,200 customers, was required to furnish "specific factual or evidentiary material" demonstrating that by disclosing audit reports and financial statements the government would cause it "irreparable [competitive] harm in its relations with contractors, materialmen, suppliers, employees, and landowners").

And the burdens continue on appeal, because the appellate court often must wade through a lengthy record to review the trial court's findings.[18]

Take this case. The district court held a two-day bench trial to assess the competitive harm of releasing store-level SNAP sales data. See Pet. 6. At trial, the Department of Agriculture presented testimony from the president and owner of a supermarket chain, the president and CEO of the National Grocers Association, a senior vice president of marketing of a convenience-store chain, an associate general counsel of Sears Holdings Management Corporation, and an expert witness on the food-retail industry. See Pet. App. 11a-15a. And their testimony concerned complex technical matters, including profit margins in the retail-food business, the potential effect of store-level SNAP sales data on commercial lease negotiations, and the use of model forecasts in developing grocery stores' expansion strategies. *Ibid.* Despite the government's substantial proof (which at a minimum

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[18] The Eighth Circuit sought to counter these considerations by asserting that applying Exemption 4 in accordance with its plain language "would swallow FOIA nearly whole." Pet. App. 4a n.4. But that assertion is unfounded. As Exemption 4's text makes clear, it applies only to "trade secrets" and "privileged or confidential" information that is "commercial or financial" in nature and that the government "obtained" from a third party. 5 U.S.C. § 552(b)(4). The Eighth Circuit provides no reason to believe that a substantial proportion of the mountains of data otherwise subject to disclosure under FOIA satisfy those criteria. And as petitioner notes, much of the information potentially subject to Exemption 4 is requested to further narrow commercial interests, rather than FOIA's objective of improving "public understanding of the operations or activities *of the government*." Pet. Br. 33-35 (quoting *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994)).

demonstrated that the data at issue "might prove useful" to competitors), the courts below still concluded that the Department had failed to satisfy its burden to justify withholding the SNAP data under the *National Parks* test. *Id.* at 5a; see also *id.* at 18a-20a.

This kind of elaborate and expensive bench trial would not have been necessary if "confidential" had been given its ordinary meaning under Exemption 4. In fact, given a plain-meaning interpretation of Exemption 4, this case may well have been decided on summary judgment. Respondent does not seriously dispute that store-level SNAP sales data "would not customarily [be made] available to the public." *Critical Mass III*, 975 F.2d at 872; see also Br. in Opp. 7 (not contesting that "information about the amount of SNAP spending at individual retail food stores is not public knowledge"). And even if that point had been disputed, the issue likely could have been decided based on affidavits and other summary-judgment evidence.

National Parks itself is another case in point. That case involved a request for financial records that national park concessioners (businesses licensed to sell goods and services in national parks) were required to file with the National Park Service. See *National Parks*, 498 F.2d at 770. The district court found that the "information was of the kind that would not generally be made available for public perusal." *Ibid.* (citation omitted). Under the term's plain meaning, that should have sufficed for the information to qualify as "confidential" under Exemption 4. Yet the D.C. Circuit remanded the case for the district court to "determin[e] whether public disclosure of the information in question pose[d] the likelihood of

substantial harm to the competitive positions" of the concessioners. *Id.* at 771.

On remand, the district court held "two days of further evidentiary hearings * * * on the competitive injury issue." *National Parks*, 547 F.2d at 675. After considering this evidence, the court concluded that the bulk of the financial information at issue was protected from disclosure under the standard that the D.C. Circuit had announced. See *ibid.*

On the case's *second* appeal, the D.C. Circuit affirmed in part and reversed in part. *National Parks*, 547 F.2d at 687-688. Parsing the extensive factual record, the court concluded that the district court had clearly erred in "finding that disclosure of the financial information would 'materially increase the opportunity for potentially damaging competition for renewal of concessions [contracts].'" *Id.* at 682. Nevertheless, the D.C. Circuit held that the financial records of five of the seven concessioners involved in the case could be withheld under Exemption 4 because the record demonstrated that those concessioners "face[d] meaningful day-to-day competition with businesses offering similar goods and services both within and outside the national parks." *Id.* at 681. In reaching that conclusion, the court examined detailed evidence regarding "the location of the park concessioners relative to other similar businesses." *Id.* at 682. The court emphasized that one town near Yellowstone National Park "boast[ed] 47 motels, 9 gas stations and 12 restaurants" that competed with Yellowstone's major concessioner. *Id.* at 682-683. Similarly, the court noted that a concessioner in Grand Canyon National Park faced competition from businesses in "a small community" approximately

"eight miles" away that "feature[d] several hundred beds, 1,000 seats for food service and assorted curio shops." *Id.* at 683. Two concessioners failed to present similarly detailed evidence regarding their particular competitive situations. *Ibid.* For those concessioners, the D.C. Circuit ordered another remand for *still more* proceedings to determine whether the concessioners had satisfied the *National Parks* standard. *Id.* at 687-688.

National Parks thus imposes significant burdens on both litigants and courts, which can readily yield multiple trips between the court of appeals and the district court for an inquiry that "typically and appropriately" should be handled on summary judgment. *Harrison*, 377 F. Supp. 2d at 145. Adhering to Exemption 4's text would minimize the burdens for litigants and courts. Exemption 4's plain language sets forth a straightforward inquiry into whether the information at issue is "confidential"—*i.e.*, has been held "in confidence" and "not publicly disseminated." *Critical Mass II*, 931 F.2d at 947 (Randolph, J., concurring). Resolving that discrete issue generally should not require elaborate evidentiary proceedings or expert testimony, promoting important interests in administrative simplicity and conserving judicial resources. Cf. *Hertz Corp.*, 559 U.S. at 94-95.

III. *National Parks* Ignores The Speed With Which Competitive Conditions Can Change

National Parks' atextual "substantial competitive harm" test is particularly inappropriate because market conditions can change rapidly and unexpectedly—as this case itself demonstrates. When

the trial below was conducted in May 2016, online retailers could not participate in the SNAP program. Accordingly, the district court understood the relevant market to be limited to brick-and-mortar grocery and convenience stores. The district court thus focused its competitive-harm analysis on whether store-level SNAP data was likely to affect a grocer's decision whether "to open a new location" that would compete with an existing store. Pet. App. 19a-20a.

After trial, however, the Department of Agriculture announced a pilot program for online retailers to accept SNAP benefits. See Supplemental Nutrition Assistance Program (SNAP): Online Purchasing Pilot, http://bit.ly/2S4oZpS. That pilot program is expected to commence this year. See *ibid.* As the U.S. District Court for the Western District of Texas recognized in granting the Texas Retailers Association's request for a preliminary injunction against the release of store-level SNAP data for Texas retailers, the introduction of online retailers into the SNAP program could fundamentally alter the competitive-harm analysis under *National Parks*. See Order Granting Plaintiff's Motion for Preliminary Injunction 15-21, *Texas Retailers Ass'n* v. *USDA*, No. 1:18-cv-659 (W.D. Tex. Aug. 27, 2018) ("*TRA* Order").[19] Because online

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[19] On February 11, 2019, the Fifth Circuit vacated the Western District of Texas's preliminary injunction, instructing the Western District to "stay its hand from further activity until the Supreme Court's decision [in this case] is rendered." See *Texas Retailers Ass'n* v. *USDA*, No. 18-50895, 2019 WL 548966, at *1 (5th Cir. Feb. 11, 2019). Notably, the Fifth Circuit panel did not disagree with the Western District's conclusion that allowing online retailers to participate in SNAP could alter the competitive-harm analysis under *National Parks*. Instead, the vacatur appears to

retailers can target the customers of existing brick-and-mortar grocers without the expense of building new stores, it is easier and less costly for them to take advantage of store-level data. See *id.* at 15-16. New online retailers would also enjoy an asymmetrical competitive advantage: They could access the store-level SNAP data of their brick-and-mortar competitors, but traditional grocers could not currently obtain similar data regarding their new online competitors, because such data does not yet exist. See *id.* at 16; see also Pet. Br. 52.

"[N]either the district court nor the Eighth Circuit considered the potential for substantial competitive harm to traditional SNAP retailers should *online* SNAP retailers have access to the redemption data." *TRA* Order 20. The post-trial development of this new, highly material competitive factor illustrates why Exemption 4's application should not hinge on forecasts of competitive harm. Market conditions are dynamic, and information that today appears to have "no or little" relevance to business decisions (Pet. App. 19a) could quickly become highly significant with changes in technology or government regulations. But once sensitive business information is made public, the cat is out of the bag. Even if shifts in market conditions would warrant reclassifying disclosed information as "confidential" under *National Parks*, no practical mechanism exists for removing it from the public domain. Absent a direction from Congress in the statute's plain text, the Court should not read into

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have been motivated by concerns of jurisdiction and comity. *Id.* at *1 & n.1.

Exemption 4 a legal standard tied to the ever-changing winds of competition.

IV. *National Parks* Risks Deterring Companies From Sharing Information With The Government And Participating In Government Programs

By artificially narrowing the universe of information within Exemption 4's scope, *National Parks* discourages businesses from disclosing information to the government, participating in mutually beneficial government programs, and even seeking government benefits, out of fear that their sensitive information might fall into competitors' hands. The D.C. Circuit itself has recognized that a chilling effect exists with respect to information that private parties are not *required* to provide to the government. As that court has explained, "[i]t is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will * * * jeopardize its continuing ability to secure such data on a cooperative basis." *Critical Mass III*, 975 F.2d at 879. Thus, as explained above, see pp. 8-9, *supra*, the D.C. Circuit has limited the *National Parks* standard so that it applies only to "information submitted under compulsion." *Critical Mass III*, 975 F.2d at 879. Other courts, however, have yet to adopt that limitation on *National Parks*, so in those circuits the chilling effect on voluntary disclosures may persist.

Furthermore, *Critical Mass III* ignores that its concern about deterring the voluntary provision of information to the government extends to programs like SNAP where the government receives that

information only after a private party *voluntarily* chooses to participate in the program. It is just as much "a matter of common sense" that private parties may hesitate to participate in voluntary government programs if there is a significant risk that they may be required to furnish information subject to public release under FOIA. See 975 F.2d at 879. The same is true of government benefit programs, which condition receipt of a benefit on the provision of information.

These deterrent effects could have widespread consequences, because the cost of participating in many programs is furnishing the government a broad array of information. For example, the Environmental Protection Agency actively seeks the participation of businesses and other stakeholders in dozens of information-sharing programs, ranging from the "Combined Heat and Power Partnership," a "voluntary program seeking to reduce the environmental impact of power generation by promoting the use of environmentally beneficial combined heat and power," to the "AgSTAR Program," an effort to "[r]educe methane emissions at confined animal feedlot operations by promoting the use of biogas recovery systems." See Environmental Protection Agency, *List of Programs*, http://bit.ly/2MNUcYj.

Because so many agencies recognize the programmatic value of the information businesses and other stakeholders provide, other examples abound. See, *e.g.*, Occupational Safety and Health Administration, *Strategic Partnerships Overview*, https://bit.ly/2StDaE5 (describing the "OSHA Strategic Partnership Program Directive," in which "OSHA enters into an extended, voluntary,

cooperative relationship with groups of employers, employees and employee representatives"); Federal Aviation Administration, *Partnerships*, https://bit.ly/2RGIgZh (describing the "NextGen Advisory Committee," which is "led by senior airline executives and others in the aviation industry" and "helps the FAA set priorities and deliver tangible benefits"). And, because private commercial information is often used by the government to determine a benefit seeker's eligibility, there is also no shortage of benefits conditioned on the provision of such information. See *Sharyland*, 755 F.2d at 398 (corporation had filed audit reports with the Farmers Home Administration in order to obtain a loan); *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1134 (D.C. Cir. 1987) (company submitted "materials demonstrating its performance in hiring, promoting, and otherwise utilizing women and minorities" as "a condition of receiving federal contracts").

By adhering to the *National Parks* test, the lower courts have jeopardized programs that serve both public and private interests. Businesses have demonstrated that they will go to great lengths to avoid disclosing particularly sensitive information. See, *e.g.*, *Donovan*, 830 F.2d at 1134-1136 (describing company's sustained opposition to disclosure of sensitive information in litigation that the D.C. Circuit called a "five-year odyssey" and a "tortuous journey"). Therefore, it is likely that many businesses will decline to participate in otherwise mutually beneficial programs, and to seek the benefits for which they are eligible, if doing so would risk exposing sensitive commercial information under FOIA.

V. Exemption 4 Affects A Wide Range Of Industries And Types Of Information

The wide range of industries and types of information affected by Exemption 4 highlights the importance of applying that exemption in accordance with the plain meaning of the text that Congress enacted. The industries Exemption 4 affects range from the nation's most influential and pervasive—such as banking, see *Inner City Press*, 463 F.3d at 242 (addressing information in bank merger application submitted to Federal Reserve Board)—to those serving far more discrete interests, see, *e.g.*, *PETA*, 901 F.3d at 347-348 (affected parties were importers of nonhuman primates). Affected parties include nuclear power producers and nuclear waste disposal companies. See *Critical Mass I*, 830 F.2d at 279-280; *Utah*, 256 F.3d at 968-969. Some affected parties trade in lumber and others in agricultural products. See *Baker & Hostetler LLP* v. *Dep't of Commerce*, 473 F.3d 312, 315 (D.C. Cir. 2006); *Lion Raisins*, 354 F.3d at 1076. Their work often involves matters of great import, including public health and international relations. See *Public Citizen*, 704 F.2d at 1282-1284 (affected parties were manufacturers of vision-correcting intraocular lenses); *Stone* v. *Exp.-Imp. Bank of U.S.*, 552 F.2d 132, 133 (5th Cir. 1977) (affected party was an agency of the Soviet Union seeking U.S.-export financing). And many are non-businesses, such as labor unions and Indian tribes. See *American Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 864-865 (2d Cir. 1978); *Utah*, 256 F.3d at 968-969.

The diversity of affected parties reflects the extraordinary variety of disclosures required or requested by the federal government. The U.S. Code

requires private parties to furnish information to the government on such varied matters as securities,[20] banks,[21] labor,[22] food purity,[23] drug safety and efficacy,[24] and even "weather modification activity."[25] And, needless to say, the government may *request* information on a potentially infinite number of subjects, and use the tools at its disposal to ensure compliance.

It is no surprise, then, that the types of information litigated in Exemption 4 cases are just as diverse. The information sought ranges from documentation of agricultural inspections to "information on [automobile] airbag systems." See *Lion Raisins*, 354 F.3d at 1075; *Ctr. for Auto Safety* v. *NHTSA*, 244 F.3d 144, 145-147 (D.C. Cir. 2001). Exemption 4 cases frequently involve expansive information requests, such as the request to the Bureau of Labor Statistics in *FlightSafety Servs. Corp.* v. *Dep't of Labor*, 326 F.3d 607, 609 (5th Cir. 2003), for "all raw data collected to create" wage determination schedules for various markets. The information requests are also often intrusive, as when the Fifth Circuit declined to prevent the release of "audit reports" and "statements" documenting in detail a corporation's financial health. *Sharyland*, 755 F.2d at 398; see also *Continental Oil*, 519 F.2d at 35 (information at issue was "a contract by contract, field by field exposition of the petitioners'

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[20] See 15 U.S.C. § 77a, *et seq.*

[21] See 12 U.S.C. § 161.

[22] See 29 U.S.C. § 431.

[23] See 7 U.S.C. § 138e.

[24] See 21 U.S.C. § 355(i).

[25] See 15 U.S.C. § 330a.

product marketing"). Sometimes, the requested information risks harming the submitter's reputation. See *Donovan*, 830 F.2d at 1134-1136 (noting submitter's concern about "adverse publicity" if information regarding its affirmative-action programs was released).

Thus, it is imperative for the Court to clear up the considerable confusion *National Parks* has created. Refocusing courts on Exemption 4's plain text will alleviate uncertainty; reduce burdens on courts, litigants, and government agencies; and allow companies to make informed decisions about whether to voluntarily share sensitive information with the government or participate in government programs that may require disclosures.

CONCLUSION

For these reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted.

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FEBRUARY 2019

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, INC. D/B/A ARGUS MEDIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

In an action brought under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, where the defendant federal agency has waived appeal of a district court's disclosure order and therefore is bound to release the information in its possession, is there a "Case" or "Controversy" under Article III of the Constitution when a private intervenor appeals the order that directs the Government to disclose the information to the public?

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SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (July 4, 1966) 14, 23

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are organizations that depend upon the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA") to investigate, publish, and hold the Government accountable for its detention and prison policies, an area in which the Government increasingly works with private entities and contractors to implement government functions. *Amici* are concerned that a decision by the Court to exercise jurisdiction in this case will permit private entities to assert unfounded control over government transparency decisions, thereby undermining their work and the purpose of FOIA.

Detention Watch Network

Detention Watch Network ("DWN") is a national coalition of organizations and individuals working to expose and challenge the injustices of the U.S. immigration detention and deportation system and advocate for profound change that promotes the rights and dignity of all persons. DWN was founded in 1997 in response to the explosive growth of the immigration detention and deportation system in the United States. Today, DWN is the only national network that focuses exclusively on immigration detention and deportation

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

issues and is known as a critical national advocate for just policies that promote an eventual end to immigration detention. As a member-led network, DWN unites diverse constituencies to advance the civil and human rights of those impacted by the immigration detention and deportation system through dissemination of information, collective advocacy, public education, communications, and field-and-network-building. Using data and records obtained through Freedom of Information Act requests and litigation, DWN researches and publishes original reports regarding detention and immigration policy. DWN was the Respondent in *Geo Grp., Inc., v. Det. Watch Network, et al.*, 138 S. Ct. 317, No. 17–64 (Oct. 10, 2017), in which this Court denied *certiorari* to a private contractor seeking to appeal a Freedom of Information Act disclosure order after the federal agency declined to appeal.

Human Rights Defense Center

The Human Rights Defense Center ("HRDC") is a nonprofit charitable corporation headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, *Prison Legal News*, which covers national and international news and litigation concerning prisons and jails, as well as *Criminal Legal News*, which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners and engages in state and federal court litigation on prisoner rights issues, including wrongful death, class actions, Section 1983 civil

rights litigation concerning the First Amendment rights of prisoners and their correspondents. It is a leader in litigating cases involving government collaboration with the private prison industry, including numerous actions under the Freedom of Information Act.

Prison Policy Initiative

The Prison Policy Initiative ("PPI") is a non-profit organization that challenges over-criminalization and mass incarceration through research, advocacy, and organizing. Founded in 2001, the PPI produces policy reports, engages in public campaigns, and disseminates advocacy materials documenting the United States' excessive and unequal use of punishment and institutional control and the consequent harms to individuals, communities and national well-being. PPI's efforts include campaigns to bring fairness to the prison and jail phone and videoconferencing industries and annual publication of *Mass Incarceration: The Whole Pie*, assembling data on individuals incarcerated in prisons, jails and detention facilities across the United States. PPI's work, which includes extensive research on government collaboration with private contractors, often relies on local and federal open records requests to document exploitation of incarcerated people and their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA") provides broad access to government information to fulfill its purpose of opening federal agencies to the light of public scrutiny and holding the

governors accountable to the governed. There is no "Case" or "Controversy" based upon FOIA without a party seeking to compel disclosure of government information and a government agency defending a statutory right to withhold such information from the public. Here, the latter is fatally missing.

The United States Department of Agriculture, the Defendant Agency that lost its argument in the district court to withhold information pursuant to 5 U.S.C. § 552 (b)(4) ("Exemption 4") and then declined to appeal, is not the petitioner before this Court. Instead, the petitioner is a private business association which intervened post-judgment to appeal the district court's order.

The absence of the Government as an appellant eliminated federal court jurisdiction over Petitioner's unilateral appeal to the Eighth Circuit, and there is likewise no "Case" or "Controversy" before this Court. The Defendant Agency, the only party in interest that can invoke and litigate FOIA exemptions, waived its right to appeal and is thus bound to disclose the requested information. The Court has no jurisdiction to relieve a non-appealing party, the Government, of this adverse judgment.

In this context, Article III's standing requirements are also a barrier to jurisdiction. As a private intervenor not bound by the judgment below, Petitioner lacks both a legally cognizable interest and a redressable injury. Indeed, redress is not only unlikely, it is foreclosed: the Court cannot relieve a non-appealing party of a binding judgment. But even if the Government had appealed, the Court still could not order the relief that Petitioner

seeks. FOIA is exclusively a disclosure statute and the federal courts cannot direct the Government to withhold information from the public.

Accordingly, an unprecedented ruling finding jurisdiction and accepting Petitioner's standing would do grave violence to FOIA. It would allow private intervenors to exercise a veto over government disclosure decisions, thereby undermining FOIA's efficacy as a tool for ensuring government transparency, particularly when government agencies partner or contract with private entities to implement government functions.

Accepting jurisdiction would also have far-reaching implications for cases involving private intervenors outside of the FOIA context. Allowing third parties to relieve the Government of binding judgments that the Government does not contest would invite intervenors to disrupt government decision-making outside of appropriate litigation channels, even when the third parties have no cognizable rights at issue. The statutory and, most significantly, constitutional requirements of jurisdiction serve as an indispensable check on such results, preserving the constitutional structure of separation of powers by restraining the Court from acting only upon actual "Cases" and "Controversies." For all of these reasons, the Court should vacate the decision of the Court of Appeals and remand for dismissal.

ARGUMENT

I. ARTICLE III'S CASE OR CONTROVERSY REQUIREMENT PRECLUDES PRIVATE PARTY INTERVENORS FROM UNILATERALLY APPEALING FOIA JUDGMENTS THAT THE GOVERNMENT HAS NOT APPEALED.

A. The Court has no jurisdiction to relieve a non-appealing party of an adverse judgment.

The Court lacks jurisdiction under Article III to address a private intervenor's appeal of a judgment under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, which the Government has not appealed. Article III of the Constitution restricts the power of the federal courts to deciding "actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quoting U.S. Const. art. III, § 2). Just as Article III requires standing to sue, it likewise demands that any party seeking to "defend on appeal in the place of an original defendant" establish a "Case" or "Controversy." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64–65 (1997); *see also Diamond v. Charles*, 476 U.S. 54, 64–65, 68 (1986). Here, Petitioner cannot clear these jurisdictional hurdles.

Specifically, the Government's "failure to invoke" the jurisdiction of the Court "leaves the Court without a 'case' or 'controversy'" between the FOIA requesters and the Government. *See Diamond*, 476 U.S. at 63–64. "[A]s a party below, the [Petitioner] remains a party here...[, b]ut status as a 'party' does not equate with status as an appellant." *Diamond*, 476 U.S. at 63 (citing Rule 10.4). "To

appear before the Court as an appellant, a party must file a notice of appeal, *the statutory prerequisite to invoking this Court's jurisdiction. See* 28 U.S.C. § 2101(c)." *Id.* (emphasis added). Here, the Government declined to appeal after the district court ruled in favor of the FOIA requester, and thus was not an appellant in the Court of Appeals as well. *Argus Leader Media v. U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th 2018). Petitioner "intervened and filed this appeal" post-judgment. *Id.*

The Government is thus bound by the lower court's judgment because it never invoked appellate jurisdiction, *see* Fed. Rule App. Proc. 3; 28 U.S.C. § 2101(c), and a private intervenor cannot relieve it of that obligation or the consequences of the judgment. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314–15 (1988) (holding that courts of appeals may not "exercise jurisdiction over parties not named in the notice of appeal"); *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398–99 (1981) (rejecting claim that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties"); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (finding the United States bound by a judgment where it failed to "avail itself of the remedy it had to preserve its rights").

The Court has held that a party cannot be relieved of the consequences of failing to appeal even where it produced "harsh" results. *Torres*, 487 U.S. at 315, 318 (finding a jurisdictional problem due to the inadvertent omission of a litigant's name from a notice of appeal due to clerical error, notwithstanding that the notice included

the designation *et. al*).[2] In contrast, there is nothing harsh about holding the Government to the judgment below where it chose not to appeal. In the absence of another party subject to the judgment who can properly appeal, here the jurisdictional defect is fatal.

The Petitioner attempts to overcome the Government's failure to appeal by effectively stepping into the shoes of the Defendant Agency and acting as if it is the Government. It cannot do so.

First, under FOIA, the Government has sole authority to determine whether to withhold information pursuant to an exemption, subject to judicial review, or to release it to the public. *Chrysler Corp. v. Brown*, 441 U.S. 281, 291–93 (1979) ("FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."). FOIA "'balances and protects all interests'" while "'plac[ing] emphasis on the fullest responsible disclosure'" in order to promote the public interest in democratic accountability. *EPA v. Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Allowing private parties "to intervene and control" FOIA litigation frustrates this statutory mandate. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 149 (1967) (reasoning that private intervenors cannot dictate public antitrust litigation because determining "what the public interest requires is the statutory duty and responsibility of the Government").

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2. In *Torres*, the Court reasoned that Federal Rule of Appellate Procedure 3(c) required the notice to "specify the party or parties taking the appeal" and without that information, Torres had not appealed. *Id.* at 315, 318.

Second, "'[a] litigant must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Hollingsworth*, 570 U.S. at 708 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Accordingly, the Court has consistently rejected intervenors' attempts to invoke the legal rights of an absent party in interest as the basis for an appeal. *Arizonans for Official English*, 520 U.S. at 64–65; *Diamond*, 476 U.S. at 64–65. Unless the third party establishes a "judicially cognizable interest" in his "own" right, *Hollingsworth*, 570 U.S. at 708, an intervenor "cannot step into the shoes of the original party[,]" *Arizonans for Official English*, 520 U.S. at 65.

This is particularly true when the non-appealing party is the Government. *Hollingsworth*, 570 U.S. at 715 (stating that this Court has never "upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to"). The principle underlying those decisions extends beyond the defense of state legislation: the Court has no jurisdiction to hear a case by a private party wishing to relieve the Government of an adverse judgment, which the Government itself does not appeal.

For example, in *Karcher v. May*, 484 U.S. 72, 75, 81–82, (1987), two state legislators intervened in a suit against the State to defend the constitutionality of a New Jersey law after the state's attorney general declined to do so. This Court held that they could not relieve the State of an adverse judgment once they were no longer presiding officers of the New Jersey Legislature. *Id.* at 78. The Court recognized that the intervenors "could vindicate" the State's interest in federal court so long as

they held positions as representatives of the New Jersey Legislature. *Hollingsworth*, 570 U.S. at 709–10 (discussing *Karcher*, 484 U.S. at 81). But once the intervenors "lost their positions as Speaker and President" in that body "they lack[ed] authority to pursue th[e] appeal" as private persons. *Id.* at 710 (citing *Karcher*, 484 U.S. at 81).

Karcher emphasized that the Court has "consistently applied the general rule that one who is not a party or has not been treated *as a party to a judgment* has no right to appeal therefrom." 484 U.S. at 77 (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917); *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911); *Ex parte Cockcroft*, 104 U.S. (14 Otto) 578, 579 (1882); *Ex parte Cutting*, 94 U.S. (4 Otto) 14, 20–21 (1877)). Here, that rule is dispositive of jurisdiction. The Intervenor-Petitioner was not a party to the judgment; it intervened and appealed post-judgment.

The Court reached a similar conclusion in *Diamond v. Charles*, where it noted that "[a]lthough intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III[.]" *Diamond*, 476 U.S. at 68 (internal citation omitted). There, the absent party in interest, the State of Illinois, had declined to defend the constitutionality of the Illinois Abortion Law on appeal. *Id.* at 61. Nevertheless, it proffered a "letter of interest" to the Court that its position regarding the law's constitutionality was identical to its position before the lower courts and "essentially coterminous" with the position of the intervenor on appeal. *Id.*

The Court held that the private party could not appeal in place of the government. *Id.* at 63–64. It reasoned that Illinois's failure to invoke the Court's jurisdiction left "the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.* at 64.

These precedents make clear that there is no Article III "Case" or "Controversy" when a private party attempts to vindicate its interests by usurping the Government's exclusive authority to appeal or accede to judgments against it. In fact, the Court found jurisdiction lacking in these cases notwithstanding the aggrieved intervenors' asserted interests and injuries. *See Karcher*, 484 U.S. at 78; *Diamond*, 476 U.S. at 64–67.

Accordingly, the Government's failure to appeal the judgment at issue here extinguished the FOIA dispute and at that point the case "lost the essential elements of a justiciable controversy[.]" *Arizonans for Official English*, 520 U.S. at 48; *Karcher*, 484 U.S. at 83 ("The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal."). The Defendant Agency is the only entity bound by the district court's disclosure order and the only entity that can seek relief from that judgment. The case should "not have been retained for adjudication on the merits by the Court of Appeals" and this Court should vacate its decision and remand for dismissal. *See id.*[3]

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3. Indeed, "[e]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'" even if the parties conceded it. *Arizonans for Official English*, 520 U.S. at 73 (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986)). Where "the record discloses that the lower

B. Private intervenors who appeal FOIA disclosure orders accepted by the Government lack the "legally cognizable interest" and redressable injury required for Article III standing.

Private intervenors have no independent standing to appeal a judgment directing the Government to disclose information to the public when the Government declines to appeal. Standing is an essential component of an Article III "Case" or "Controversy" and "'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth*, 570 U.S. at 705 (quoting *Arizonans for Official English*, 520 U.S. at 64).

As the Court recently emphasized in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, when there are multiple litigants, "[a]t least one plaintiff must have standing to seek each form of relief requested" and "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." 137 S. Ct. 1645, 1651 (2017); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352

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court was without jurisdiction this court will notice the defect" even if the parties have not asserted the jurisdictional claim. *Id.* at 73 (concluding that the Court had authority to "make such disposition of the whole case as justice may require" where the Court of Appeals "refused to stop the adjudication" once the court lost jurisdiction); *see also United States v. Corrick*, 298 U.S. 435, 440 (1936) (recognizing jurisdiction "merely for the purpose of correcting the error of the lower court in entertaining the suit"); *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 72–73 (1983) (per curiam) (vacating Court of Appeals' judgment where lower court ruled on the merits notwithstanding that the case was moot).

(2006). Here, where the Government has foregone an appeal, the Intervenor-Petitioner cannot independently establish Article III standing to support the relief it seeks: reversal of a judgment binding the Government. *See Hollingsworth*, 570 U.S. at 709; *Arizonans for Official English*, 520 U.S. at 48.

1. Private Parties have no "legally protected interests" under FOIA

Private party intervenors have no legally protected interests that give rise to an "injury in fact" when the Government declines to appeal a FOIA judgment. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo v. Robbins, Inc.*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted)). In *Chrysler Corp. v. Brown*, this Court held that private parties have no legally protected interests under FOIA, and a court has no power to order the government to keep its documents secret. 441 U.S. 281, 291–93 (1979) (citing 5 U.S.C. § 552(a)(4)(B) (providing district courts with "jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant" but making no provision for judicially ordered secrecy).

In *Chrysler*, the corporate plaintiff, a contractor with the Department of Defense ("DOD"), sought to enjoin DOD's release of affirmative action plans and equal employment opportunity reports, claiming they were "confidential" pursuant to FOIA Exemption 4. *Id.*

at 286–88, 291. The Court rejected Chrysler's attempt to bar disclosure, finding it contrary to FOIA's "language, logic" and "history." *Id.* at 291–92.[4]

It reasoned that while FOIA's exemptions, and "Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities" *id.* at 291, the statute protects the interests of private parties "only to the extent that this interest is endorsed" by the government. *Id.* at 292–93 ("[T]he congressional concern was with the agency's need or preference for confidentiality."). The Court therefore concluded that FOIA does not grant a private right of action to parties seeking to block government disclosures and district courts lack jurisdiction to compel the withholding of government information. *Id.*

For over forty years following *Chrysler*, the federal courts have recognized that FOIA does not provide private parties with any "legally protected interests" that permit them to compel the withholding of information from the public. *See, e.g., Acumenics Research & Tech. v. Dep't of Justice*, 843 F.2d 800, 804 (4th Cir. 1988) ("[A] private party seeking to block an agency's disclosure of

4. SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (July 4, 1966), available at http://www.llsdc.org/assets/sourcebook/foia-lh.pdf (FOIA's exemptions "were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information"). Thus, private entities, and even the courts, have no grounds under the FOIA to second-guess statutorily authorized government decisions that favor transparency.

information under FOIA has no private right of action[.]"); *In re Providence Journal Co.*, 820 F.2d 1342, 1349 (1st Cir. 1986) ("FOIA does not authorize an injunction against disclosure."); *NOW v. Soc. Sec. Admin. of Dep't of Health and Human Servs.*, 736 F.2d 727, 744–45 (D.C. Cir. 1984) ("[T]he FOIA right of action extends only to those who request disclosure."); *Stoianoff v. Comm'r of Motor Vehicles*, 107 F. Supp. 2d 439, 444 (S.D.NY. 2000) ("[T]here is no private right of action to enjoin agency disclosures of information under FOIA.").

This universally recognized inability of private parties to compel the Government to withhold information forms not only a statutory barrier to suit, but also goes to the heart of Article III's jurisdictional requirements. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (suggesting that the absence of even a plausible "cause of action"[5] could "implicate subject-matter jurisdiction") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), holding that Article III standing requirements were not met because the "specific items of relief sought, and none that [Court could] envision as 'appropriate'" would redress the injuries claimed by the party, *id.* at 105–06). For the reasons addressed in Part IA, *supra*, there is no plausible jurisdictional basis for the Court to reverse a judgment that does not affect the legal rights of the intervenor, and which the Government has not appealed.

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5. While the Petitioner may have had a cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, *see* Part IIA *infra*, it has never brought such a claim, and relief under the APA is not before the Court. There is no standing to pursue relief in this case when the Government is not an "appellee" or "appellant" before this Court.

Moreover, *amici* cannot find a single case, and the parties have not cited one, prior to the Eighth Circuit's decision below in May 2018, where an appellate court permitted a private intervenor, acting alone, to appeal a FOIA decision ordering the Government to disclose information. In fact, only seven months before the Eighth Circuit's decision, this Court denied *certiorari* in another Exemption 4 FOIA dispute where a private intervenor unsuccessfully attempted to do just that. *See Geo Grp., Inc., v. Det. Watch Network, et al.*, 138 S. Ct. 317, No. 17–64 (Oct. 10, 2017).

In that case, brought by *Amicus* Detention Watch Network, the United States Court of Appeals for the Second Circuit granted its motion to dismiss the intervenors' appeal for lack of standing where the Government had failed to appeal. *Det. Watch Network v. Corr. Corp. of Am.*, No. 16-3141 (L), 2017 WL 4122728, at *1 (Feb. 8, 2017), *cert denied* 138 S. Ct. 317 (2017). The lack of any prior case recognizing the standing of a private intervenor to appeal a FOIA disclosure order in the place of the Government underscores the weakness of the Article III standing claimed here.

The Solicitor General acknowledges the unusual posture of this case but draws the wrong conclusion from its aberration. It claims that the appeal of a FOIA judgment "in which the government did not participate on appeal, is extraordinarily atypical for a FOIA action." U.S. Br. at 32. That is true insofar as the demands of Article III should have prevented the private intervenor from pursuing a unilateral appeal before the Court of Appeals. But neither the jurisdictional mistake below, nor the Government's changing views and representation of

whether it will exercise its statutorily conferred discretion to disclose, *see* Respondents' Br. at 32, provides a sound justification for a one-time recognition of standing. The Government's decision not to appeal is dispositive; there is no jurisdiction.

Moreover, *Amici* caution that the inclination on the part of private interests to exercise unfounded oversight over FOIA is not aberrational, as demonstrated by private intervenors' unsuccessful efforts in *Detention Watch Network*, 138 S. Ct. 317, to seek this Court's review last term. Indeed, private intervenors have significant incentives to attempt unfounded oversight of FOIA decisions. Once the Government has agreed to release its information, private parties may seek to litigate merely to delay disclosure of government information they may prefer be kept secret even when the Government has no basis to withhold.

The Solicitor General also submits that because a private party opposing disclosure is "'unable to plead its own FOIA-based 'claim for relief' or a FOIA-related 'defense[] to [any] claim asserted against it,'" a private actor "opposing disclosure could not properly intervene as of right in a FOIA action under Federal Rule of Civil Procedure Rule 24." U.S. Br. at 32 (citing Fed. R. Civ. P. 8(a) and (b)(1)(A)). Putting aside the standards that should apply to Rule 24, which is not before the Court,[6]

6. *Amici* submit that intervention was inappropriately granted here under Rule 24. Both the record below and the proceedings in *Det. Watch Network*, No. 16-3141 (L), 2017 WL 4122728, at * 1, suggest that district courts may follow a more lenient approach to Rule 24 than that urged by the Solicitor General, allowing intervention even where a party seeks to compel

the Solicitor General's position does not reconcile how an insufficient interest for purpose of intervention should nonetheless satisfy the "legally protected interest" demanded by Article III.

Indeed, numerous courts have recognized that even where a party has a valid "interest" to justify intervention as of right below, that cannot, of its own force, establish the constitutional requirements of Article III, particularly "in the absence of the party on whose side intervention was permitted[.]" *Diamond*, 476 U.S. at 68; *see also id.* at 69 (intervenors' interests below were "plainly . . . insufficient to confer standing" on appeal); *Town of Chester*, 137 S. Ct. at 1651 ("an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing").

As the many decisions that have followed *Chrysler* have necessarily recognized, private intervenors have no "legally protected interests" at stake in a now-resolved FOIA dispute. Just as intervenors could not sue to block an agency's disclosure through FOIA directly under *Chrysler*, they may not usurp the Government's FOIA authority and appeal a FOIA judgment in place of the Government to achieve that result.

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withholding and has not asserted an APA claim. As a practical matter then, Rule 24 is not a consistent gatekeeper against third party attempts to assert unfounded control over FOIA and, in any event, is no answer to the jurisdictional question before the Court.

2. This Court cannot order relief that would redress the private intervenor's purported injury.

Petitioner's purported injury is not redressable because the relief the private intervenor seeks, a judicial order directing or permitting the Government to withhold information, cannot be issued in this case. That is true first and foremost for the reasons stated in Part IA, *supra*: An intervenor cannot relieve the Government of a judgment it has not appealed. But redressability is not "likely" for other reasons as well. FOIA is "exclusively a disclosure statute," and the federal courts have no "authority to bar disclosure" under the statute. *Chrysler*, 441 U.S. at 292.

First, the constitutional requirement of "likely" redress, *Lujan*, 504 U.S. at 561, cannot be met in this case even if a favorable ruling for the petitioner would merely *permit* the Government to withhold the disputed information should they choose to do so. Here, redress is not only speculative, it is foreclosed. The Government, by waiving its right to appeal, abandoned any claim it had to withhold the documents under Exemptions 4 of FOIA. *Federated Dep't Stores, Inc.*, 452 U.S. at 398 (rejecting claim that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties"). That decision is irreversible; the Government cannot now withhold documents pursuant to Exemption 4 because it has not preserved its right to do so.

The Government's assurances that it would not release information pending the Petitioner's appeal (U.S. Br. at 34) and its compliance with court-ordered stays (U.S. Br. at 9) cannot cure this failure to appeal. It is bound to

disclose, and the Court lacks jurisdiction to reverse the judgment and permit the Government to withhold the contested information.

Second, as the Solicitor General acknowledges, this appeal "could not result in any limitation on the agency's discretion to disclose its own records[.]" U.S. Br. at 32 (stating FOIA "prohibits only the improper 'withholding [of] agency records' and does 'not limit an agency's discretion to disclose information'") (quoting *Chrysler*, 441 U.S. at 292). This means that Petitioner's claimed injury cannot "be redressed by a favorable decision" by this Court on the scope of Exemption 4. *Lujan*, 504 U.S. at 561. Indeed, redress cannot depend upon "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (noting the Court's "reluct[ance] to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

The United States' reliance on *ASARCO*, 490 U.S. at 618-19, is misplaced. That case involved an appeal of an Arizona Supreme Court ruling that invalidated a state law limiting mining leases and sales. *Id.* at 610, 618. The state court ruling challenged by the intervenors in ASARCO was an "adjudication" of the intervenor's "legal rights." *Id.* at 618. Indeed, the ASARCO intervenors held leases "granted under the state law the Arizona Supreme Court invalidated." *Id.* Thus, the Court found a redressable injury because a reversal of the declaratory judgment would mean the intervenors' leases were no longer invalid.

Id. The same is not true here where intervenors have no "rights" implicated by FOIA, *see Chrysler*, 441 U.S. at 292, and none were adjudicated in the FOIA judgment, which binds only the Government.

In sum, Petitioner's purported injury is not redressable because the relief the private intervenor seeks, a judicial order directing or permitting the Government to withhold information, cannot be issued in this case. An intervenor cannot relieve the Government of a judgment it has not appealed, and even if it could, redressability is still not "likely." The Government has discretion under FOIA to decide to release its information to the public, notwithstanding available exemptions, and the Court has no authority under FOIA to order the Defendant Agency to withhold information and grant the only relief that would redress Petitioner's claim.

II. ACCEPTING JURISDICTION OVER INTERVENOR'S APPEAL IN THE ABSENCE OF THE GOVERNMENT PARTY IN INTEREST WOULD UNDERMINE CONGRESSIONAL INTENT.

A. Petitioner cannot challenge government disclosures under FOIA outside of the Administrative Procedure Act.

In seeking to stop the Government from disclosing the requested information in this case, Petitioner failed to utilize the only available means of challenging the government's decision to disclose information requested under FOIA to the public: the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 *et seq.* In declaring forty

years ago in *Chrysler* that there is no private right of action under FOIA, the Court recognized that the only action available to private parties to challenge government disclosure decisions is a "Reverse-FOIA" suit pursuant to the APA. *Chrysler*, 441 U.S. at 317. (finding that Petitioner could challenge disclosure of information through "Section 10(a) of the APA, [which] provides that '[a] person suffering legal wrong because of agency action, or adversely aggrieved or affected by agency action..., is entitled to judicial review thereof'").

Here, Petitioner avoided this avenue, notwithstanding the numerous cases proceeding under an APA analysis in the years before and since *Chrysler Corp. See, e.g., Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1329 (D.C. Cir. 2014) (affirming grant of summary judgment to defendant agency in reverse-FOIA claim brought by private party to challenge disclosure under § 706(2) of the APA and finding that defendant agency's decision to disclose was not "arbitrary and capricious"); *McDonnell Douglas v. U.S. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004) (in reverse-FOIA claim brought by private contractor under § 706 (2) of the APA, finding agency decision to disclose arbitrary and capricious and contrary to law); *Planned Parenthood of the Great NW & the Hawaiian Islands, Inc., v. Azar*, 352 F. Supp. 3d 1057 (W.D. Wa. 2018) (same); *General Electric v. Dep't of the Air Force*, 648 F. Supp. 2d 95 (D.D.C. 2009) (same); *MCI Worldcomm, Inc. v. General Services Admin.*, 163 F. Supp. 2d 28 (D.D.C. 2001) (same). Its failure to do so underscores the improper nature of its claim here.

Moreover, Petitioner's failure to avail itself of the APA is no reason to permit it to challenge disclosure under the standard Congress provided *only to the Government*

when it seeks to withhold information under FOIA. *See* 5 U.S.C. § 552(b)(4) (exempting information from disclosure where government can show it is "obtained from a person" and "confidential or privileged"). To permit Petitioner to do so would allow private parties to avoid the standard applicable to APA challenges, which sets aside government action only if it is "arbitrary and capricious" or otherwise not in accordance with law, 5 U.S.C. § 706(2). The Court should reject Petitioner's attempt to work around Congress's express intent and four decades of precedent requiring disclosure challenges to be made through the APA.

B. Permitting private petitioners to place themselves in the shoes of the Government when the Government itself has abandoned an appeal would undermine FOIA's mandate.

Accepting jurisdiction over Petitioner's claim would do violence to FOIA and its overarching mandate of public disclosure. As this Court recognized in *Chrysler*, FOIA and its legislative history make clear that Congress never intended private entities to have veto power over government decisions to release information to the public. *Chrysler*, 411 U.S. at 291–93. Congress intentionally did not create a private cause of action to mandate secrecy under FOIA. *See* 5 U.S.C. § 552; *see Brown*, 441 U.S. at 291–92; SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (July 4, 1966), *available at* http://www.llsdc.org/assets/sourcebook/foia-lh.pdf (FOIA's exemptions "were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information").

Accordingly, private entities, and even the courts, have no grounds under FOIA to second-guess statutorily conferred government decisions that favor transparency. That is true, even where, as here, the Government has changed its position acceding to disclosure (U.S. Br. at 34). This statement cannot provide the intervening Petitioner with standing, much less cure the Government's failure to appeal. Indeed, such a posture was rejected more than thirty years ago in *Diamond*, 476 U.S. at 62–64.

Lacking a private right of action to compel government secrecy in service of its particular commercial interests, the Petitioner presents itself to this Court as if it is the Government. The Petitioner cannot stand in the shoes of the Government, assert FOIA exemptions statutorily available only to the Government, and interfere with the balance Congress sought to strike between the public and their elected representatives regarding the transparency appropriate in our democracy. In the end, Article III reinforces this limitation on the judicial role. *See Steel Co.*, 523 U.S. at 101 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

To undermine this clear and unquestioned principle where federal agencies depend on private actors to implement policy would shield a wide array of government activity from public view, contrary to FOIA's "basic purpose" of "open[ing] agency action to the light of public scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (internal citation and quotation omitted).

See also P.L. 94-409 (S 5), PL 94-409, Sept. 13 1976, 90 Stat. 1271("It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government"). As Exemption 4 itself contemplates, agency action that relies upon private contractors and entities to implement government policy is not outside of FOIA's reach.

Indeed, the reality of government collaboration with private contractors only heightens the need for strict adherence to Congress's approach to government transparency in FOIA. As traditional government functions, including incarceration and detention, are increasingly implemented by private contractors, allowing private parties to exercise a non-statutory veto power over government disclosure decisions under FOIA would irrevocably damage citizens' ability to see "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal citation and quotation omitted).

Finally, Petitioner's post-judgment intervention and despite its lack of standing ultimately disrupts and delays the production of information that is of great value to the public—in contravention of FOIA. Delay is antithetical to the "FOIA's goal of prompt disclosure of information." *Stonehill v. I.R.S.*, 558 F.3d 534, 539 (D.C. Cir. 2009).

Opening the door for well-resourced private entities to appeal district court disclosure orders after the Government declines to do so would impose enormous costs on FOIA requestors and delay the release of information to the public for years, even if such appeals lose on the

merits. Such a result is antithetical to FOIA, a statute with "constitutional resonance" in light of its powerful role in ensuring democratic accountability. *See* Eric M. Freedman, *Commentary, Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 BROOK. L. REV. 835, 837 (1983).

Allowing intervenors to step into the shoes of the Government where the Government has acceded to a judgment and waived its right to appeal will also likely have unexpected consequences beyond the FOIA context. Weakened jurisdictional restraints could invite a broad array of claims by private actors who seek to disrupt and challenge government decision-making outside of appropriate litigation channels. The Court's Article III precedents prevent this undesirable result.

Petitioner has presented no compelling reason to reject decades of precedent and Congress's express mandates.

CONCLUSION

The Petitioner lacks standing to appeal the Government's statutorily conferred and irrevocable decision to disclose documents under FOIA and its legally conclusive decision to forego an appeal of the district court's decision that Petitioner disagrees with. Accepting jurisdiction over Petitioner's claim will frustrate the Congressional purpose underlying FOIA and set the stage for hiding any government activity touching private collaboration from public view. The Court should vacate the decision of the Court of Appeals and remand for dismissal.

Respectfully submitted,

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March 25, 2019

No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND TWENTY LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues, to promote government transparency, and to protect privacy, the First Amendment, and other constitutional values.

EPIC has filed several briefs before this Court and other federal courts concerning the federal Freedom of Information Act. *See, e.g.*, Brief of *Amici Curiae* EPIC et al., *FCC v. AT&T*, 562 U. S. 397 (2011) (No. 09-1279) (arguing that the phrase "personal privacy" in the FOIA applies to individuals, not corporations); Brief of *Amici Curiae* EPIC et al., *ATF v. City of Chicago*, 537 U.S. 1229 (2003) (02-322) (arguing that FOIA procedures should be updated "in an age of electronic record keeping"); Brief of *Amici Curiae* EPIC et al., *N.Y. Times v. DOJ*, 756 F.3d 100 (2d Cir. 2014) (No. 13-422) (arguing that OLC opinions should be disclosed under FOIA).

EPIC is also one of the top FOIA litigators in the United States. FOIA Project, *FOIA Suits Filed by Nonprofit/Advocacy Groups Have Doubled Under Trump* (Oct. 18, 2018).[2] EPIC relies upon access to

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] EPIC is among the top five FOIA litigators in the United States for the period 2001-2018, as measured by the

government documents to pursue its mission: to focus public attention on emerging privacy and civil liberties issues. Many of EPIC's government transparency projects have depended on access to commercial information contained in agency documents. *See, e.g.*, EPIC, *EPIC v. FTC (Facebook Assessments)* (2019);[3] EPIC, *Domestic Unmanned Aerial Vehicles (UAVs) and Drones* (2019);[4] EPIC, *EPIC v. Education Department – Private Debt Collector Privacy Act Compliance* (2019);[5] EPIC, *EPIC v. DHS – Body Scanner Complaints* (2019).[6] The documents EPIC obtains through its FOIA work are reported in the national media. *See, e.g.*, Davey Alba, *The US Government Will Be Scanning Your Face At 20 Top Airports, Documents Show*, Buzzfeed (Mar. 11, 2019);[7] Ava Kofman, *The FBI is Building a National Watchlist that Gives Companies Real-Time Updates on Employees*, The Intercept (Feb. 4, 2017);[8] Spencer Woodman, *Documents Suggest Palantir Could Help Power Trump's 'Extreme Vetting' of Immigrants*, The Verge (Dec. 21, 2016);[9] Charlie

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[10] https://www.nytimes.com/2013/08/21/us/facial-scanning-is-making-gains-in-surveillance.html.

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SUMMARY OF THE ARGUMENT

The Freedom of Information Act ("FOIA") establishes a right of the public to know "what their government is up to." *Nat'l Archives & Record Admin. v. Favish*, 541 U.S. 157, 171 (2004). The FOIA is necessary to enable the public to obtain information "from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). But "official hands" are often not the only hands FOIA requesters must grapple with. Private companies—as government contractors and vendors—play an integral role in government activities that impact the privacy of Americans. And these private parties, acting on behalf of public agencies and with public funding, often hide their activities behind an expansive view of one of the exemptions in the FOIA. Government agencies are also responsible for investigating and enforcing privacy obligations on private companies that concern the privacy rights of Americans. Public access to the commercial information contained in agency records is therefore necessary to ensure adequate oversight of these enforcement duties.

Petitioner's proposal for a broad, subjective interpretation of "confidential" in Exemption 4 would deprive the public, and government watchdogs such as EPIC, of access to important information about "what the government is up to." Under a subjective test, companies could seek to withhold any commercial information that they consider confidential without regard to the public interest in disclosure.

There are also significant jurisdictional questions that make this case a poor vehicle to address the Exemption 4 issue. As the Court recently explained in *Frank v. Gaos*, 584 U.S. ___, 2019 WL 1264582 (Mar.

20, 2019), Article III standing must be analyzed by lower courts in the first instance. Yet the lower courts did not analyze whether the Food Marketing Institute, a trade association, had standing to intervene and appeal the district court judgment. In fact, the Petitioner in this case has a significantly weaker standing claim than the consumer plaintiffs in *Gaos*. The Government's arguments in the two cases are also irreconcilable. The Court should remand for the lower court to address standing.

ARGUMENT

"An informed electorate is vital to the proper operation of a democracy." S. Rep. No. 89-813, 3 (1965). For this reason, Congress passed the Freedom of Information Act ("FOIA") in 1966. Senator Long quoted James Madison as he introduced the bill:

> A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives.

Id. at 2-3 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822)).[11]

Congress passed the FOIA to "overhaul the public-disclosure section of the Administrative Procedure Act (APA)" and correct the law's shift to more of "a withholding statute than a disclosure statute." *Milner*

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[11] *Available at* https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text.

v. Dep't of Navy, 562 U.S. 562, 565 (2011). Congress intended the FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). While Congress acknowledged that the public's interest in transparency would, in some circumstances, have to be balanced with competing interests in privacy, Congress envisioned the FOIA as "a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 89-813, 3 (1965). Thus, the FOIA creates a "strong presumption in favor of disclosure." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and the FOIA's nine exemptions "must be narrowly construed." *Milner*, 562 U.S. at 565.

Nearly thirty-five years ago, the D.C. Circuit adopted the substantial competitive harm test to determine the scope of "confidential" commercial information protected by Exemption 4. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The court rejected the same subjective test advanced by Petitioners. *Id.* at 766. The First Circuit, in adopting *National Parks*, quoted the House Committee on Government Operations in its 1978 Report to similar effect:

> disclosure policy cannot be contingent on the subjective intent of those who submit information. For example, it clearly would be inappropriate to withhold all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests for information.

9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys., 721 F.2d 1, 9 (1st Cir. 1983) (quoting H.R. Rep. No. 95–1382, 18 (1978)). When the D.C. Circuit in *Critical Mass* adopted a subjective test for a limited subset of records (information given voluntarily to government agencies), then-Judge Ginsburg warned of the perils of allowing such a test:

> No longer is there to be an independent judicial check on the reasonableness of the provider's custom and the consonance of that custom with the purposes of exemption 4 and of the Act of which the exemption is part. To the extent that the court allows providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed "subjective" . . .

Critical Mass Energy Project v. NRC, 975 F.2d 871, 885 (D.C. Cir. 1992) (en banc) (Ginsberg, J., dissenting).

A broad, subjective definition of "confidential" would limit the public's ability to conduct meaningful oversight of government surveillance activities and the government's enforcement of privacy obligations on commercial entities. The Government now routinely relies on contractors to develop and deploy systems used to collect personal data and to conduct surveillance. And regulatory agencies gather commercial information from businesses to enforce federal privacy laws. A subjective confidentiality test under Exemption 4 would allow companies, acting with taxpayer dollars on behalf of federal agencies, to conceal

information that would otherwise be available to the public.

There is also significant doubt that the Petitioner has satisfied the standing requirements of Article III necessary to invoke this Court's jurisdiction. *See* Resp't Br. 1. As in *Frank v. Gaos*, 584 U.S. ___, 2019 WL 1264582 (Mar. 20, 2019), the Court has "an obligation to assure [itself] of litigants' standing under Article III." Slip op. 5 (quoting *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 340 (2006)). The Petitioner's standing claim here is much weaker than the unlawful disclosure injury that the plaintiffs alleged in *Gaos*. The records at issue in this case were not even created by the Food Marketing Institute, and the Institute was not the entity that provided data to the USDA.

The Court in *Gaos* found remand was necessary because the lower courts must address standing in the first instance, and this case should be no different.

I. The objective definition of "confidential" commercial information established in *National Parks* is necessary to ensure oversight of government programs that implicate privacy.

The public must have access to commercial information in agency records to conduct effective oversight of government programs that implicate privacy. Federal agencies, across the government, contract with private companies to build data collection and surveillance systems. Technical specifications, contracts, and other similar records describing the functions of these systems is provided to the Government by private companies. These records include commercial information that should be available to the public. Without access to this information, it would be

impossible to verify whether the systems do what the government says they do, or whether the systems pose a threat to the privacy of Americans. The government also obtains commercial information from companies during the course of investigating potential privacy violations. Access to commercial information held by agencies is thus also necessary for the public to evaluate the government's protection of privacy rights.

Companies that build data collection systems are notoriously secretive. For example, Amazon and Facebook have requested state and local governments alert them of open government requests concerning their business practices immediately upon receipt. Mya Frazier, *Big Tech's Bid to Control FOIA*, Colum. Journalism Rev. (Feb. 2, 2018).[12] Many companies do not want their work on government surveillance programs to be revealed.

But "[s]unlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People's Money* 62 (1933)). And for watchdog groups such as EPIC, access to agency records, including commercial information provided by contractors and vendors, is essential to understand the privacy implications of government activities. A broad, subjective definition of "confidential" in Exemption 4 would limit public oversight of the programs of federal agencies.

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[12] https://www.cjr.org/business_of_news/facebook-amazon-foia.php.

A. Public access to business records promotes accountability of government agencies responsible for enforcement.

Government agencies, including the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC"), are charged with investigating business practices that may violate the privacy rights of consumers. But oversight does not end with federal agencies. EPIC and other watchdog organizations rely on the FOIA to inform the public about emerging privacy issues and to independently assess the risks these programs pose. Public oversight of the functions of government—the purpose of the FOIA—is not possible if the technical details and other commercial information collected by federal agencies is not accessible to the public.

The FOIA enables public oversight of agencies' and businesses' compliance with privacy laws in several ways. First, records from enforcement agencies, such as the FTC and FCC, can inform the public about whether companies are engaged in business practices that threaten consumer privacy. These records contain commercial information gathered during investigations and pursuant to consent decrees. Second, agencies compile technical specifications and other information that contain commercial information about the contractors that build and operate government systems. These records can have implications for oversight of both government data collection and of consumer privacy investigations. Businesses typically seek to withhold this information from the public.

Commercial information EPIC obtained as a result of FOIA requests submitted to the FTC, the FCC, and the DOJ has helped improve the effectiveness of

these agencies and safeguarded the America public. For example, EPIC was able to obtain information about Google's privacy practices from the FTC in 2012. EPIC, *EPIC FOIA Uncovers Google's Privacy Assessment* (Sept. 28, 2012).[13] Google entered into a consent decree with the FTC in 2010 after it violated users' privacy by disclosing their private contact lists. *See* EPIC, *In re Google Buzz* (2019). As part of the settlement, the FTC required Google to file regular privacy assessment reports with the Commission detailing its steps to comply with the consent order. Press Release, Fed. Trade Comm'n, FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network (Mar. 30, 2011).[14] Google shuttered Buzz after the FTC investigation. Nancy Gohring, *Google Kills Buzz*, Computerworld (Oct. 14, 2011).[15] The release of Google's privacy assessments gave the public greater insight into the company's privacy practices and facilitated future enforcement efforts.

In another case, EPIC's FOIA work led to the disclosure of records that made clear the full extent of Google's unlawful collection of private Wi-Fi data. Google was subject to numerous investigations after it was revealed that the company had collected private Wi-Fi data via its "Street View" vehicles. EPIC,

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[13] https://epic.org/2012/09/epic-foia-uncovers-googles-pri.html.

[14] https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.

[15] https://www.computerworld.com/article/2499002/google-kills-buzz.html.

Investigations of Google Street View (2019).[16] EPIC and others wrote to the FCC to urge an investigation; the Commission ultimately fined Google a mere $25,000 for obstructing the investigation. Lucia Mutikani, *Google Fined $25,000 for Impeding FCC Investigation*, Reuters (Apr. 15, 2012).[17] The FCC initially released only a heavily redacted version of its report on the investigation. Fed. Commc'ns Comm'n, *In the Matter of Google Inc.*, DA 12-592, 27 FCC Rcd. 4012 (2012). EPIC subsequently filed several FOIA requests seeking disclosure of the full, unredacted report, and disclosure of records from the related Justice Department investigation. EPIC, *Investigations of Google Street View*, *supra*. In response to the FOIA requests, the FCC released a letter it had sent to Google rejecting the company's "very broad request for confidential treatment of the information it submitted" in response to the Commission's investigatory inquiry. Letter from Teresa Z. Cavanaugh, Chief, Investigations and Hearings Division Enforcement Bureau, Fed. Commc'ns Comm'n, to Google 2 (April 13, 2012).[18] On April 28, 2012, Google released a complete, unredacted copy of the FCC's report. Fed. Trade Comm'n, *In the Matter of Google Inc.*, DA 12-592, Notice of Apparent Liability of Forfeiture *Unredacted* (April 13, 2012).[19] Significantly, the full report made clear that

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[16] https://epic.org/privacy/streetview/.

[17] https://www.reuters.com/article/net-us-google-fine/google-fined-25000-for-impeding-fcc-investigation-idUSBRE83F00Q20120416.

[18] https://transition.fcc.gov/foia/Letter-Ruling-Regarding-Confidentiality-Request.pdf.

[19] *Available at* https://assets.documentcloud.org/documents/351298/fcc-report-on-googles-street-view.pdf.

Google had intentionally intercepted payload data for business purposes and that many supervisors and engineers within the company reviewed the code and the design documents associated with the project. *See* David Kravets, *An Intentional Mistake: The Anatomy of Google's Wi-Fi Sniffing Debacle*, Wired (May 2, 2012).[20]

Records EPIC obtained from the FTC under the FOIA also raised important questions about whether the agency has pursued effective oversight of companies subject to its legal authorities. In 2011 the FTC opened an investigation into Facebook's privacy practices and subsequently entered into a consent decree requiring the company to implement a comprehensive privacy program and submit to third-party audits for 20 years. *See* EPIC, *In re Facebook* (2019);[21] Press Release, Fed. Trade Comm'n, Facebook Settles FTC Charges That It Deceived Consumers by Failing To Keep Privacy Promises (Nov. 29, 2011).[22] Under the terms of the order, Facebook is required to submit the independent audits to the FTC, but the FOIA is currently the only mechanism that ensures those audits will be made public. In the wake of the Cambridge Analytica scandal, EPIC filed a FOIA request to the FTC seeking documents related to the enforcement of the consent order, including the full release of all Facebook privacy assessments. *See* FOIA Request from

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[20] https://www.wired.com/2012/05/google-wifi-fcc-investigation/.

[21] https://epic.org/privacy/inrefacebook/.

[22] https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep.

EPIC to Fed. Trade Comm'n (Mar. 20, 2018).[23] EPIC eventually sued the FTC for the release of these documents. Complaint, *EPIC v. FTC*, No. 18-942 (D.D.C. filed Apr. 20, 2018).

As a result of EPIC's lawsuit, the FTC has released partially redacted versions of Facebook's privacy assessments and hundreds of pages of communications between the Commission and Facebook. The communications show that when Facebook initially submitted its first privacy assessment in 2013, the company enclosed two versions of the privacy assessment—a confidential version and a non-confidential version with self-selected redactions. *See* EPIC, *EPIC v. FTC (Facebook Assessments)* (2019).[24] Facebook's non-confidential version submitted to the FTC liberally applied redactions, yet the FTC reprocessed this assessment in the course of EPIC's lawsuit and released much of the information that Facebook had originally claimed was "confidential." *See, e.g.*, Letter from Michael Richter, Chief Privacy Officer, Product, Facebook and Erin Egan, Chief Privacy Officer, Policy, Facebook to James A. Kohm, Esq., Associate Dir. For the Division of Enforcement, Bureau of Consumer Protection, Fed. Trade Comm'n (Apr. 23, 2013);[25] *cf.* Independent Assessor's Report on Facebook's Privacy Program: For the Period August 15, 2012 to February 11,

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[23] https://www.epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20180320-Request.pdf.

[24] https://epic.org/foia/FTC/facebook/.

[25] *Available at* https://epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20181012-FTC-FB-Communications.pdf (page 19).

2013, PricewaterhouseCoopers (reprocessed version released June 26, 2018).[26]

The FTC's use of the D.C. Circuit's *National Parks* test to reprocess the privacy assessments shows that much of what Facebook had considered "confidential" was often inconsequential and would not cause substantial competitive harm if released to the public.

Without the full release of these assessments, the public would be left in the dark about the effectiveness of third-party audits. In the 2017 privacy assessment, which included the period when Facebook knew of Cambridge Analytica's illicit data transfer, the auditor erroneously certified that the privacy controls were operating with "sufficient effectiveness." In fact, Facebook knew about the significant breach of persona data and never informed the FTC. None of the documents released under the FOIA indicate that Facebook notified the Commission of its knowledge that Cambridge Analytica unlawfully harvested the data of millions of Facebook users. While the FTC reprocessed EPIC's FOIA requests for the privacy assessments and released more information, significant sections of the assessments are redacted under Exemption 4. In the aftermath of the Cambridge Analytica scandal, three years after Facebook discovered the unlawful data transfer, the FTC launched an open investigation into Facebook's privacy practices. Press Release, Fed. Trade Comm'n, Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding

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[26] https://www.epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20180626-FB-Assessment-2013.pdf.

Reported Concerns about Facebook Privacy Practices (Mar. 26, 2018).[27]

In other instance, the release of records, containing commercial, under the FOIA have led to significant changes in agency practices and helped safeguard American military families. For example, in 2009, EPIC filed a FOIA request to the Army and Air Force Exchange Service seeking agency records about the software program "My Military Sentry," including any contracts between the agency and Echometrix, Inc. FOIA request from EPIC to Army and Air Force Exchange Serv. (Oct. 20, 2009).[28] Echometrix produced parental control software and promised to monitor children's online activity. But Echometrix also collected data about children and sold the data to third parties for market-intelligence research.

EPIC filed a complaint with the FTC in 2009 alleging that Echometric had engaged in unfair and deceptive trade practices by representing that its software protects children while simultaneously collecting and disclosing information about children's online activity—a direct violation of the Children's Online Privacy Protection Act. *In re Echometrix* (Complaint, Request for Investigation, Injunction, and Other Relief) (Sept. 25, 2009).[29] EPIC obtained documents as a result of its FOIA request that revealed the Defense Department canceled a contract with Echometrix

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[27] https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection.

[28] https://epic.org/privacy/echometrix/AAFES_FOIA.PDF.

[29] http://epic.org/privacy/ftc/Echometrix%20FTC%20Complaint%20final.pdf.

following an EPIC complaint to the FTC in 2009. *See* EPIC, *Echometrix* (2015).[30]

As a consequence of EPIC's FOIA work, the Army and Air Force Exchange Service removed My Military Sentry from their online store, stating in an e-mail to Echnometrix, "[t]he collection of AAFES customer information (personal or otherwise) for any other purpose than to provide quality customer service is prohibited . . . . Giving our customers the ability to opt out does not address this issue." *Id.*

The FTC also took action against the firm, based on EPIC's FOIA work. The Commission eventually announced a settlement of its charge against Echometrix requiring the company to not use or share information obtained through its programs for any purpose other than allowing registered users to use their account; destroy the information illicitly transferred to third-party marketers; and requires standard report and record-keeping provisions to allow the Commission to monitor compliance. Press Release, Fed. Trade Comm'n, FTC Settles with Company that Failed to Tell Parents that Children's Information Would be Disclosed to Marketers (Nov. 30, 2010).[31] EPIC's access to commercial records helped protect military families and also ensure that FTC pursued its enforcement obligations.

In another case, documents EPIC obtained from the U.S. Department of Education, including

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[30] https://epic.org/privacy/echometrix/.

[31] https://www.ftc.gov/news-events/press-releases/2010/11/ftc-settles-company-failed-tell-parents-childrens-information.

commercial information, revealed that many private debt collection agencies maintained incomplete and insufficient quality controls for the data they collect. *See* EPIC, *EPIC v. Education Department – Private Debt Collector Privacy Act Compliance* (2019).[32] As government contractors, debt collectors must follow the Privacy Act, a federal law that protects personal information. The Department of Education also requires student debt collectors to submit quality control reports indicating whether the companies maintain accurate student loan information. The documents obtained by EPIC revealed that many companies provided small sample sizes to conceal possible violations of the Act. *See* EPIC, *EPIC v. Education Department: FOIA Documents* (2019).[33] The documents also showed that many companies did not submit required information about Privacy Act compliance to the Department of Education. EPIC's pursuit of the release of this information allowed for greater public oversight of the Department of Education in overseeing Privacy Act compliance with private debt collectors.

B. Public access to technical specifications and other records from government contractors enables oversight of data collection programs.

Public oversight of government data collection and surveillance systems also requires access to the contracts and technical specification records that private manufacturers provide the government. Substantial privacy problems that led to bipartisan reform would not have been uncovered if EPIC and others

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[32] https://epic.org/foia/ed/.

[33] https://epic.org/foia/ed/#foia.

could not obtain and analyze agency records that describe these systems and how they function.

For example, EPIC relied on documents obtained under the FOIA, including commercial information such as technical specifications and contracts, to assess the privacy implications of the Transportation Security Administration's ("TSA") use of body scanners in U.S. airports. *See* EPIC, *Whole Body Imaging Technology and Body Scanners ("Backscatter" X-Ray and Millimeter Wave Screening)* (2019).[34] The campaign against the deployment of body scanners, which captured nude images of every airline passenger, exemplifies the type of public oversight that would be nearly impossible if Exemption 4 imposed a broad, subjective definition of "confidential." In 2007, the TSA began testing body scanners in select U.S. airports. Paul Giblin & Eric Lipton, *New Airport X-Ray Scans Bodies, Not Just Bags*, N.Y. Times (Feb 24, 2007).[35] The TSA's announcement that it would make the scanners mandatory for primary screening in all U.S. airports was met with swift and bipartisan opposition. Joe Sharkey, *Whole-Body Scans Pass First Airport Tests*, N.Y. Times (Apr. 6, 2009).[36] Republican Congressman Jason Chaffetz introduced an amendment to prohibit the TSA "from using Whole Body-Imaging machines for primary screening at airports," require the TSA "to give passengers the option of a pat-down search in place of going through a WBI machine, information on the images generated by the WBI, the privacy policies in place, and the right to request a pat-

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[34] https://epic.org/privacy/airtravel/backscatter/.

[35] https://www.nytimes.com/2007/02/24/us/24scan.html.

[36] https://www.nytimes.com/2009/04/07/business/07road.html.

down search," and prohibit the TSA "from storing, transferring, or copying the images " 155 Cong. Rec. D644 (daily ed. Jun. 4, 2009). The amendment passed 310-118. *Id.*

In the midst of this public debate, EPIC filed a FOIA request with the Department of Homeland Security ("DHS") for documents regarding the procurement and use of the body scanners. FOIA Request from EPIC to Dep't of Homeland Sec. (Apr. 14, 2009)[37]. As a result of EPIC's FOIA suit, the agency released device specifications, including procurement documents and contracts with L3 and Rapiscan Systems, that showed that the scanners were able to store and transfer images. *Assessment of Checkpoint Security: Are Our Airports Keeping Passengers Safe? Hearing Before the Subcomm. on Transportation Sec. & Infrastructure Protection of the H. Comm. on Homeland Sec.*, 111th Cong. 67 (Mar. 17, 2010) (joint prepared statement of Marc Rotenberg & Lillie Coney) (Hereinafter "EPIC Body Scanner Testimony").

The documents contradicted the TSA's previous representations that the devices could not store or transmit scans. Dep't of Homeland Sec., *Privacy Impact Assessment Update for TSA Whole Body Imaging*, 8 (Jul. 23, 2009) (TSA had "the manufacturer disable the data storage capabilities prior to delivery to TSA");[38] Transp. Sec. Admin., *Whole-Body Imaging* (May 28, 2009) ("The image cannot be stored, transmitted or printed, and are deleted immediately once viewed. In fact, the machines have zero storage

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[37] *Available at* https://epic.org/foia/FOIA_041409.pdf.

[38] *Available at* https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbiupdate.pdf.

capability.")[39] The documents obtained by EPIC also called into question whether the scanners could detect powdered explosives. EPIC Body Scanner Testimony. The story was widely reported and of significant interest to the public. *See, e.g.*, Matthew L. Wald, *Mixed Signals on Airport Scanners*, N.Y. Times (Jan. 12, 2009);[40] Jeanne Meserve & Mike M. Ahlers, *Body scanners can store, send images, group says*, CNN (Jan. 11, 2010).[41] In the immediate aftermath, Rep. Chaffetz remarked, "We don't need to look at naked 8-year-olds and grandmothers to secure airplanes. I think it's a false argument to say we have to give up all of our personal privacy in order to have security." David G. Savage, *The Fight Against Full-body Scanners at Airports*, L.A. Times (Jan. 13, 2010).[42] Rep. Chaffetz later used documents that EPIC received under the FOIA, which included commercial information, to support efforts to limit the use of body scanners in U.S. airports and to enhance the privacy protections for travelers 156 Cong. Rec. E1,238-E1,239 (daily ed. Jun. 30, 2010).[43]

Ultimately, public outcry led Congress to require the TSA to remove all body scanners from U.S. airports that could not be programmed to produce a

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[39] https://web.archive.org/web/20090528121532/http://www.tsa.gov/approach/tech/body_imaging.shtm.

[40] https://www.nytimes.com/2010/01/13/us/13scanners.html.

[41] http://www.cnn.com/2010/TRAVEL/01/11/body.scanners/.

[42] http://articles.latimes.com/2010/jan/13/nation/la-na-terror-privacy13-2010jan13.

[43] *Available at* https://www.congress.gov/crec/2010/06/30/CREC-2010-06-30-pt1-PgE1238-2.pdf.

generic human outline of a traveler instead of a nude image. 49 U.S.C. § 44901(l)(2)(B). The TSA subsequently removed the backscatter x-ray body scanners manufactured by Rapiscan Systems because the company could not produce the necessary software. Bart Jansen, *TSA Dumps Near-Naked Rapiscan Body Scanners*, USA Today (Jan. 18, 2013).[44]

Many other oversight campaigns have relied on technical data provided to federal agencies and then obtained through the FOIA to reform agency practices. For example, EPIC obtained records from U.S. Customs and Border Protection ("CBP") that included product specifications for drones; these specifications showed that Predator B drones operated by CBP are able to recognize and identify a person on the ground. EPIC, *EPIC FOIA – US Drones Intercept Electronic Communications and Identify Human Targets* (Feb. 28, 2013).[45] An EPIC FOIA also revealed that Army blimps deployed over Washington, D.C., contained extensive surveillance equipment, including video surveillance capabilities. EPIC, *EPIC FOIA Case – Army Blimps over Washington Loaded with Surveillance Gear, Cost $1.6 Billion* (Aug. 29, 2014).[46] After this was revealed, the Army publicly committed not to put cameras on the blimps over the capitol area. Craig Timberg, *Army Now Says It Won't Put Cameras on*

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[44] https://www.usatoday.com/story/travel/flights/2013/01/18/naked-airport-scanners/1845851/.

[45] https://epic.org/2013/02/epic-foia---us-drones-intercep.html.

[46] https://epic.org/2014/08/epic-foia-case---army-blimps-o.html.

Surveillance Aircraft in Maryland, Wash. Post (Sept. 3, 2014).[47]

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These examples show how public access to commercial information is necessary to enable oversight of government practices that implicate privacy rights. If the *National Parks* standard is diminished, Exemption 4 could prevent the public from accessing this critical information.

II. The Government's argument that there is no Article III standing issue in this case is inconsistent with the Court's recent decision in *Frank v. Gaos*.

There is "a substantial question" about whether Petitioner has standing to appeal the lower court's judgment. The standing issue was not addressed by the lower courts and cannot be resolved by this Court in the first instance. *Frank v. Gaos*, 586 U.S. ___, 2019 WL 1264582, slip op. at 6 (Mar. 20, 2019) ("We 'are a court of review, not of first view.'"). The Court has "an obligation to assure [itself] of litigants' standing under Article III." *Id.* at 5 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). Yet the United States simply asserts that "petitioner had Article III standing to appeal." Br. United States As Amicus Curiae 31 [hereinafter United States *Food Marketing Institute* Amicus]. The Government's assertion in this case is inconsistent with its arguments challenging consumers' standing to sue for privacy violations in *Frank v. Gaos*. The plaintiffs in *Gaos* have a much stronger

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[47] https://www.washingtonpost.com/news/the-switch/wp/2014/09/03/armys-eyes-in-the-sky-built-to-spot-people-from-5-kilometers-away/.

standing claim than the intervenor-petitioner trade association in this case, and the Court nevertheless remanded *Gaos* to the lower courts to address standing in the first instance.

In *Frank v. Gaos*, the Court granted a Writ of Certiorari to decide "whether a class action settlement that provides a *cy pres* award but no direct relief to class members satisfies the requirement that a settlement binding class members be "fair, reasonable, and adequate."' *Gaos*, 586 U.S., slip op. at 5. The underlying dispute in *Gaos* concerned consolidated class action complaints against Google, alleging that the company violated users' privacy by disclosing their search queries to owners of third-party websites. *Id.* at 2. Google filed several motions to dismiss the complaints, which were granted in part and denied in part. *Id.* at 3. The lower court held, in particular, that one of the plaintiffs had standing to sue for violations of the class members' rights under the Stored Communications Act, 18 U.S.C. § 2702(a). *Gaos v. Google, Inc.*, No. 10-4809, 2012 WL 1094646, *4 (N.D. Cal., Mar. 29, 2012). The plaintiffs later entered into a settlement with Google on behalf of all class members, which "required Google to include certain disclosures about referrer headers on three of its webpages" but allowed Google to "continue its practice of transmitting users' search terms in referrer headers." *Gaos*, 586 U.S., slip op. at 4. The settlement provided no monetary or injunctive relief to class members; several class members challenged the fairness of the settlement. *Id.* at 4.

The standing issue in *Gaos* was not raised by any of the parties during the appeal of the settlement. Indeed, the issue was not raised at all after the settlement until the United States Solicitor General "filed a

brief as *amicus curiae* supporting neither party" on the merits in the Court. *Id.* at 5. The Solicitor General argued that "There is a substantial question about whether plaintiffs had [Article III] standing" to pursue their Stored Communications Act claims. Brief for the United States as Amicus Curiae 13, *Frank v. Gaos*, 584 U.S. __ (2019) (No. 17-961) [hereinafter United States *Gaos* Amicus Brief]. The basis of the Solicitor General's argument was that the district court did not apply the Article III standing test articulated by the Court in *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016). *See* United States *Gaos* Amicus Brief, *supra*, at 13–15.

The Court ordered supplemental briefing on the standing issue after oral argument. Order, *Frank v. Gaos*, 586 U.S. ___ (Nov. 20, 2018) (No. 17-961). And the parties filed extensive briefs on the issue, raising "a wide variety of legal and factual issues not addressed in the merits briefing before [the Court] or at oral argument." *Gaos*, 586 U.S., slip op. at 6. The Class Plaintiffs filed a supplemental brief and explained that "the alleged wrongful disclosure of individual communications supports standing here" and that "centuries of law likewise establish that persons whose *communications* are disclosed without authorization 'need not allege any *additional* harm beyond' the disclosure itself. Class Respondents' Supplemental Brief on Article III Standing 5, *Frank v. Gaos*, 584 U.S. ___ (2019) (No. 17-961) (emphasis in original). The Solicitor General, in contrast, argued that none of the named plaintiffs has Article III standing to challenge the unlawful disclosure of their private communications. Supplemental Brief for the United States As Amicus Curiae Supporting Neither Party, *Frank v. Gaos*, 584 U.S. __ (2019) (No. 17-961).

The Government's position in this case is inconsistent with its position in *Gaos*. The only support offered for the assertion that Food Marketing Institute has standing to pursue the appeal in this case is the fact that the USDA "had previously given independent assurances that it would not disclose store-level redemption data" and that the agency "affirmatively assured the court that it would not release that data during petitioner's expected appeal." United States *Food Marketing Institute* Amicus, *supra*, at 34. The Government argued that "even though the USDA could have released the data without a court order requiring disclosure," the Petitioners had standing based on a "threatened *injury of disclosure*" because there was a sufficient likelihood that the injury "would be redressed if petitioner prevailed on appeal." *Id.* 35 (emphasis added).

So according to the Government's brief in *Food Marketing Institute*, the disclosure of store purchase data collected by a federal agency can be an injury-in-fact to a trade association even though the trade association was not the one that provided the data to the government and the agency is lawfully permitted to disclose the data. But according to the Government's brief in *Gaos*, the disclosure of an individual's private communications in violation of federal law cannot possibly be an injury-in-fact. That is "pure applesauce." *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting). And even if a lower court could be convinced that the intervenors in this case have standing to pursue an appeal, that determination cannot be made by the Court in the first instance. *See Gaos*, 584 U.S., slip op. at 6.

CONCLUSION

For the above reasons, EPIC respectfully ask this Court to affirm the decision of the U.S. Court of Appeals for the Eighth Circuit and remand the case.

Respectfully submitted,

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No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* FREEDOM OF INFORMATION ACT AND FIRST AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici are scholars specializing in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the First Amendment. The two areas are deeply intertwined. As Congress has explained: "Open government [is] . . . the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government." S. Rep. No. 93-854, at 1–2 (1974). "[F]reedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression." *Id.*

In recognition of these vital rights, *amici* respectfully submit this brief to underscore how the significant departure from precedent urged by Petitioner and its *amici* stands in stark contrast to the values laid out by Congress through its enactment of, and constant supervision over, FOIA. *Amici* will demonstrate how Petitioner and its *amici* have forgotten the bedrock lessons that FOIA history teaches. The Appendix lists the individual scholars.

SUMMARY OF ARGUMENT

Petitioner argues for sweeping changes to FOIA's test for disclosure of confidential commercial information

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1. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. Both parties have given blanket consent to the filing of all *amicus* briefs.

under Exemption 4 used by all Courts of Appeals for the past forty-four years, beginning with *National Parks* in 1974. Acknowledging that FOIA does not define the term "confidential," the *National Parks* court held that the statute requires disclosure— notwithstanding a claim that the withheld records are confidential commercial information—absent a showing of either (1) impairment of the government's ability to obtain necessary information in the future; or, as relevant here, (2) infliction of substantial competitive harm to the information submitter. 498 F.2d 765, 770 (D.C. Cir. 1974). That test has withstood the test of time. Any change should come from Congress, rather than this Court, because of the unusual context of FOIA, and the unusual context of this case.

1. Unlike many other statutes, FOIA has been the subject of active interest from Congress. Through a series of twelve overhauls, Congress has made plain that it has an unwavering and increasing commitment to transparency, and an unhesitating willingness to cast aside Executive or judicial actions that set back this purpose. Congress was and remains keenly aware of the *National Parks* test and has repeatedly rejected calls from industry and other branches of government to alter or replace it since the test was first conceived. What is more, Congress not only failed to repudiate *National Parks*, but affirmatively based other, non-FOIA laws on the *National Parks* test, expressing its strong endorsement of, and indeed reliance on, the standard. The Court itself declined to overrule *National Parks* despite calls from the petitioner and the Chamber of Commerce to do so in its one and only case on Exemption 4, *Chrysler Corporation v. Brown*, 441 U.S. 281, 291 (1979)—a decision adopting a flexible approach to Exemption 4 based on the "the language, logic, [and] history" of FOIA as envisioned by Congress.

Post-*Chrysler*, this Court's sitting Justices have expressed the need to defer to Congress in the arena of FOIA. This Court should not change course now.

2. Even if this Court declines to follow *National Parks*, FOIA's clear congressional mandate in favor of transparency means that any standard that this Court adopts must favor transparency, not opacity. Two historic decisions, *Milner v. Department of the Navy*, 562 U.S. 562, 571–572 (2011), and *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973), *abrogated by statute as recognized in Central Intelligence Agency v. Sims*, 471 U.S. 159, 189 n.5 (1985), illustrate the flaws with Petitioner's reasoning. Specifically, they stand for the proposition that courts must interpret the scope of FOIA exemptions with a "narrow compass." Further, the judiciary cannot defer to the government (or for that matter, a private party) "because it says so"—which is essentially what Petitioner and its *amici* advocate. As these decisions demonstrate, Congress has unequivocally mandated that courts use their *de novo* and *in camera* powers of review, § 552(a)(4)(B), to scrutinize agency decisions by reviewing declarations attesting to the concrete harms disclosure would work and giving specific, non-conclusory reasons for withholding. Similarly, any standard that may replace *National Parks* should require courts to carefully examine the reasons for withholding and the harms resulting from disclosure.

3. Finally, this Court should not even reach the merits of this case. Congress in 2016 passed new FOIA amendments, which codified a "foreseeable harm" standard, § 552(a)(8)(A)(i)(I), requiring agencies to demonstrate concrete and specific wrongs resulting from disclosure. That standard is at least as protective as *National Parks*, if not more so.

Because the operative FOIA requests in this case predate the 2016 amendments, a decision here would only confuse lower courts as to the relevance of the "foreseeable harm" standard. To avoid this outcome, this Court should wait until the issue presents itself in a different case that properly raises the standard's legal effect, and only after the issue has percolated in the lower courts. After all, any benefit of deciding this dispute is negligible, because there are only nine pending cases in the lower courts that have the potential to involve *National Parks* with FOIA requests that predate the 2016 amendments (including one Administrative Procedure Act case). Thus, a decision is likely to work more harm than good, and this Court should dismiss the writ of certiorari as improvidently granted. In the alternative, the very least this Court can do is to make clear any adverse ruling has no bearing on the 2016 FOIA amendments because the issue is not presented in the briefing or on the facts of this case.

ARGUMENT

I. Active Congressional Supervision Shows It Is The Business Of Congress, Not This Court, To Modify What Has Been The Definitive Test For Exemption 4 Since 1974.

FOIA is an unusual statute and has been subject to active congressional oversight and an unwavering congressional commitment to transparency. When FOIA's transparency mandate has been disregarded either by the Executive or the judiciary, Congress has not hesitated to amend FOIA to underscore that FOIA must be construed in a manner favoring disclosure. Indeed, over the course of FOIA's over fifty-year history, Congress has amended the statute twelve times, each time to increase transparency,

including overriding Presidential vetoes to do so. It is against this backdrop of active oversight and focus on transparency that Congress's refusal to disturb the *National Parks* test must be viewed. This Court should not upend that long-standing history and precedent now.

A. FOIA Is An Unusual Statute Characterized By Active Congressional Oversight And An Unwavering Commitment To Transparency.

In responding to the lack of government accountability created by "the very vastness of our Government and its myriad of agencies," S. Rep. No. 89-813, at 3 (1965), Congress passed FOIA in 1966, Pub. L. 89-554, 80 Stat. 383 (1966). FOIA filled the void left by its vaguely worded predecessor, Section 3 of the Administrative Procedure Act. Whereas Section 3 contained several loopholes through which agencies could "deny legitimate information to the public," Congress designed FOIA to "establish a general philosophy of full agency disclosure." S. Rep. No. 89-813, at 3 (1965). In this way, FOIA "provides the necessary machinery to assure the availability of [g]overnment information necessary to an informed electorate." H.R. Rep. No. 89-1497, at 12 (1966). To ensure that "[t]he needs of the electorate" do not outpace "the laws which guarantee public access to the facts in [g]overnment," *id.*, Congress continually assesses whether FOIA indeed lives up to its goal of broad disclosure.

Over the course of FOIA's over fifty-year history, "Congress has repeatedly revisited the law to better balance the public's right to know." H.R. Rep. No. 114-391, at 8 (2016). For example, following the battle over the Pentagon Papers, the Watergate scandal, and the Court's decision in *Mink*, Congress sought to reinforce

FOIA's pro-transparency mandate. *See generally U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings Before a Subcommittee of the Committee on Government Operations*, 92nd Cong., 1st Sess. (1971); 120 Cong. Rec. 6811 (1974) (statement of Rep. Wright); *see infra* Part I.B. In exercising its oversight to correct Executive and judicial missteps, Congress held countless hearings, compiled numerous reports, and ultimately passed critical pro-transparency amendments with overwhelming bipartisan support. *See infra* Part I.B.-C.

Even today, Congress remains at-the-ready to defend FOIA's goal of broad disclosure. In 2015, the House Committee on Oversight and Government Reform—exercising its oversight over the Executive's use of FOIA—held hearings entitled "Ensuring Agency Compliance with the Freedom of Information Act," Serial No. 114-91, at 1 (June 3, 2015). The resulting 2016 amendments vindicated "'the people's right to know' about the activities and operations of government," and provided for a "clear presumption" in favor of "more disclosure of records, through both proactive disclosure and limitations on the use of exemptions." H.R. Rep. No. 114-391, at 8–9 (2016). Framed within this context of proactive vigilance, Congress's refusal to disturb *National Parks* is all the more striking.

B. Congress Has Clearly Articulated That Broad Interpretations Of FOIA's Exemptions Are At Odds With FOIA's Pro-Transparency Mandate.

Congress has not hesitated to amend FOIA to abrogate court decisions or executive actions that do not effectuate FOIA's goal of maximum transparency and

has made clear that courts may not rubberstamp agency action but must rigorously scrutinize the claims made by the government. The cautionary tale of *Environmental Protection Agency v. Mink* demonstrates that Petitioner's proposed interpretation of the word "confidential" stands in stark contrast to FOIA's pro-transparency mandate as articulated by Congress.

In *Mink*, the Supreme Court held, in clear contravention of Congress's original intent, that a district court had no power to review a classified record *in camera* for the purpose of segregating non-secret components from secret components withheld under Exemption 1. 410 U.S. at 81. The Court interpreted Exemption 1 broadly. Even though it covered only records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," *id.* at 81 (quoting 5 U.S.C. § 552(b)(1) (1970)), the Court held that whether a record was properly classified pursuant to the governing Executive order was not itself subject to judicial review. *Id.* at 84. Cherry-picking certain legislative history, the Court stated that the exemption tracked the language of Executive Order 10501. *Id.* at 82–83. According to the majority, this history "negate[d] the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter." *Id.* at 84 (italics added).

Three members of the Court vehemently disagreed, splitting the Court five to three.[2] Two members found

2. Justice Rehnquist took no part in the consideration of the case.

the Court's ruling was one in "flat defiance of [FOIA's] congressional mandate" and was an "inexplicable" "construction" of the plain language and history of FOIA that flew "in the face of [] overwhelming evidence of [] congressional design." *Id.* at 100–101 (Brennan, J., concurring in part and dissenting in part). They concluded that the majority's reading "wholly frustrate[d] the objective" of FOIA. *Id.* at 105. The effect of the ruling would mean the Executive could shield broad swaths of non-secret information simply by attaching that information to properly classified records, thereby evading judicial review. *Id.* at 97. According to the third member, this meant the government could "make even the time of day 'Top Secret.'" *Id.* at 110 (Douglas, J., dissenting).

Congress forcefully reacted to *Mink*. In its March 5, 1974 report, the House Committee on Government Operations noted that "[*i*]*n camera* inspection of the documents by the Court to determine if the information actually falls within the criteria of the Executive Order was specifically rejected by the Court in its interpretation of section 552(b)(1) of the Act." H.R. Rep. No. 93-876, at 7 (1974). Accordingly, the Committee proposed to grant courts discretion to use *in camera* review as a means for "look[ing] at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order." *Id.* This intention reflected the Committee's broader purposes—to "reach the goal of more efficient, prompt, and full disclosure of information." *Id.* at 5.

The Senate—despite brief pushback—also endorsed FOIA's goal of broad disclosure, releasing a nearly identical bill. An early Senate version directed courts to rule in favor of the government unless, following

in camera review, they found withholding "without reasonable basis" under an executive order's criteria. *See* S. Rep. No. 93-854, at 51 (1974). The Senate ultimately declined to incorporate this presumption, recognizing it undermined the purpose of the amendments to abrogate *Mink* through the implementation of more meaningful review. 120 Cong. Rec. 17022–25 (1974) (statements of Senator Muskie and Senator Kennedy); *id.* at 17031–32 (passing Senator Muskie's amendment by a vote of 56 to 29).

President Ford vetoed the bipartisan bill. Gerald R. Ford, *Veto of Freedom of Information Act Amendments*, 1974 Pub. Papers 374 (Oct. 17, 1974). But Congress was determined to reinstate a pro-transparency understanding of FOIA. The House voted 371 to 31 to override the veto. 120 Cong. Rec. 36633 (1974). The Senate agreed, overriding the veto by a vote of 65 to 27. *Id.* at 36882. The final text of the amendments, which remains good law today, provides that courts in reviewing agency actions must "determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions . . . and the burden is on the agency to sustain its action." § 552(a)(4)(B) (italics added).[3]

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3. The 1974 FOIA amendments also changed the text of Exemption 1. Originally, Exemption 1 exempted records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," 5 U.S.C. § 552(b)(1) (1970), to make clear that the courts should look behind classification labels. As amended, Exemption 1 covers records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such

C. Congress Has Made Clear Its Approval Of *National Parks*.

Not only has Congress expressed its commitment to transparency generally, it also has specifically endorsed the *National Parks* standard. Although the Court has previously relied on "unusually extensive legislative history" to reject interpretations that were never debated by Congress, *Chisom v. Roemer*, 501 U.S 380, 396 (1991), this Court need not even rely on such a canon here because Congress *has* explicitly considered the issue and has chosen to leave *National Parks*'s understanding of the scope of Exemption 4 undisturbed while relying on it in other statutes.

i. Congress Has Amended FOIA Ten Times Since *National Parks*, Actively Rejecting Calls To Eliminate Or Modify Its Standard.

As Petitioner itself acknowledges, Pet. Br. at 28, vocal opponents, including industry and other government actors, have been trying to do away with the *National Parks* test since the case was decided in 1974. Congress was well aware of this opposition, but chose to leave the standard intact, ignoring calls to modify Exemption 4 in the ten times FOIA has been amended since *National*

Executive order." 5 U.S.C. § 552(b)(1) (2012). In other words, the 1974 amendments were not just about *in camera* review, but also instructed courts to assess the government's purported claims of harm to evaluate if the government's explanations for withholding were compelling.

Parks.[4] Indeed, Petitioner's very test was skewered by the House Committee on Government Operations. In the words of the Committee:

> Ever since its first use, the substantial competitive harm test has been severely criticized by many businesses and corporate attorneys who would return to the "promise" or "expectation" test of confidentiality. Their arguments are not convincing. As discussed above, these tests have a very insubstantial basis in the legislative history, and are generally inconsistent with the language of the fourth exemption as well as the policy underlying FOIA.

H.R. Rep. No. 95-1382, at 21 (1978).

Three years after *National Parks*, subcommittee hearings were held exclusively on the scope of Exemption 4, including proposals to do away with the test. *See Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcommittee on Intergovernmental Relations of the Committee on*

4. *See* Pub. L. 93-502 §§ 1-3, 88 Stat. 1561–64 (1974); Pub. L. 94-409, § 5(b), 90 Stat. 1247 (1976); Pub. L. 95-454, Tit. IX, § 906(a)(10), 92 Stat. 1225 (1978); Pub. L. 98-620, Tit. IV, Subtitle A, § 402(2), 98 Stat. 3357 (1984); Pub. L. 99-570, Tit. I, Subtitle N, §§ 1802, 1803, 100 Stat. 3207, 3207 (1986); Pub. L. 104-231, §§ 3-11, 110 Stat. 3049 (1996); Pub. L. 107-306, Tit. III, Subtitle B, § 312, 116 Stat. 2390 (2002); Pub. L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a), 12, 121 Stat. 2525, 2526, 2527, 2530 (2007); Pub. L. 111-83, Tit. V, § 564(b), 123 Stat. 2184 (2009); Pub. L. 114-185, § 2, 130 Stat. 538 (2016).

Governmental Affairs, 96th Cong. 379 (1980) (describing 1977 hearings). Industry groups there advanced arguments strikingly similar to those now made by Petitioner, claiming in both oral and written testimony that Congress should "strike down the substantial competitive harm test of confidentiality." *Business Records Exemption of the Freedom of Information Act: Hearings Before a Subcommittee of the Committee on Government Operations*, 95th Cong. 157 (1977) (statements of Charles I. Derr). Witnesses complained that *National Parks* took "the test established by Congress and turned it on its head and made it a matter virtually impossible of proof." *Id.* at 158.

The Committee Report resulting from the hearings pointedly ignored these complaints and indicated that the "substantial competitive harm test . . . appear[ed] to be the best formulation [of Exemption 4] to date." H.R. Rep. No. 95-1382, at 2 (1978). The Committee further observed "[t]he rapid general acceptance of the substantial competitive harm test—the first confidentiality test based solely on objective and not subjective criteria—[was] strong evidence that the court in *National Parks* made a significant stride in dealing with the problems of confidential business information." *Id.* at 20–21. The Committee concluded that the *National Parks* test was not perfect, but firmly decided to leave it in place until the Supreme Court reached a decision in *Chrysler*. *See Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs*, 96th Cong. 379 (1980) (describing the 1978 House Committee's reaction); *see infra* Part I.D.

Post-*Chrysler*, Congress has chosen time and again to preserve the standard. In 1980, one year after *Chrysler*, a Senate Judiciary subcommittee report on its FOIA oversight hearings confirmed that "Congress intended [Exemption 4] to protect . . . financial or commercial information that is privileged and confidential," and required agencies to "balance the competitive interest of a business against the public's right to know vital health, safety, economic, and legal information," *Staff of the Subcommittee on Administrative Procedure and Practice, Senate Judiciary Committee*, 95th Cong., at 3 (Comm. Print 1980), an interpretation that runs directly counter to Petitioner's view of Exemption 4.

Again in 1981, the House Committee on Government Operations evaluated renewed critiques of *National Parks*, including proposed amendments to the text of Exemption 4. Industry groups repeated their arguments that *National Parks* "was—and is—wrong because it flatly contradicts the congressional intent that an agency was not to disclose information that 'would not customarily be made public by the person from whom it was obtained by the Government'" and railed that Congress had ignored industry's "repeated suggestions on this point." *Freedom of Information Act Oversight Hearings: Subcommittee of the House Committee on Government Operations*, 97th Cong. 877 (1981). One proposed amendment, H.R. 3928, would have made the "trade secrets exemption mandatory except . . . where the submitter [] consented . . . to disclosure" or where the agency could demonstrate an "overriding public interest in disclosure." *Id.* at 878.

Other heavy hitters joined in. The lead lawyer for Chrysler submitted extensive written and oral

testimony that *National Parks* contradicted the text and legislative history of Exemption 4, though he conceded the testimony they offered was "very much the same" as in the 1977 hearings that had rejected their pitch. *Id.* at 555 (testimony of Burt Braverman). Chrysler's lawyer called on Congress to "amend exemption 4" to "provide greater protection for confidential business information," *id.* at 555, or to "make clear that 'substantial competitive harm' is not the exclusive test of confidentiality" by providing that the confidential commercial information be made available "only if (1) there is no alternative source of information which can be disclosed without identifying the submitter, and (2) failure to disclose would seriously injure an overriding public interest," *id.* at 574. Another witness, a senior lawyer for Proctor & Gamble and author of a legal textbook on FOIA, argued that *National Parks* was a form of "judicial legislation" that harmed industry by making the burden to oppose disclosure too costly from a litigation perspective, and claimed it was "deserv[ing of] careful reexamination" when Congress considered amendments to FOIA in 1981. *Id.* at 600.

In the 1986 FOIA amendment hearings, this time the Chairman of the Administrative Conference of the United States—the "[g]overnment's in-house think tank on problems of administrative law and procedure"—attacked the *National Parks* test, claiming that "the proprietary interest of the submitter should carry a different kind of weight in the calculus," and arguing that "submitters should [not] have to show substantial harm, but simply that this kind of disclosure can reasonably be expected to impair legitimate interests, be they financial, commercial, research or business interests." *Freedom of Information Act Amendments of 1986: Hearing Before a Subcommittee*

of The House Committee on Government Operations, 99th Cong. 100–101 (1986) (evaluating a bill to amend FOIA, H.R. 4862). Despite these criticisms, the subcommittee conducting the hearings did not amend the bill to change the *National Parks* test in any way, though Congress did amend FOIA in 1986, leaving the *National Parks* test intact. Pub. L. 99-570. Congress subsequently amended FOIA five additional times, never altering Exemption 4. *See supra* note 4.

ii. Congress Passed Laws Relying On *National Parks*.

Since the 1980s, Congress not only has made clear that it does not intend to abrogate *National Parks*, but also has affirmatively interwoven the case's "substantial competitive harm" test into other legal contexts. Because *National Parks* is a workable standard of which Congress approves, later-enacted statutes incorporate Exemption 4—and its judicial gloss—rather than fashion new confidentiality rules. Indeed, a rejection of *National Parks* by this Court would produce ripple effects across a variety of laws that have incorporated Exemption 4.

For example, when Congress passed the Omnibus Budget Reconciliation Act of 1981, it explicitly stated its preference for applying the *National Parks* analysis to the Exemption 4 standard. The Act required the Consumer Product Safety Commissioner to offer manufacturers the opportunity to mark certain information as "confidential," defined to include any information that would fall within Exemption 4 of FOIA. Pub. L. 97-35, § 1204(6)(a)(4), 95 Stat. 357, 713 (1981). The House Conference Committee noted its intent to apply the *National Parks* test,

forbidding the disclosure of information that would "result in any significant competitive harm" to the company and providing factors for the "significant competitive harm" analysis. H.R. Conf. Rep. 97-208, at 877 (1981). The factors clearly indicated a rejection of the univeral test laid out by Petitioner and its *amici*, including weighing "whether the information would reveal to competitors operational strengths and weaknesses." *Id.* To protect business, Congress provided that the information submitter must be given "notice . . . [if] the commission considers such material to be outside the scope of confidential information," *id.* at 878—protections similar to agency-specific FOIA regulations that currently account for the concern that the *National Parks* test is insufficiently protective of industry.

The Federal Trade Commission (FTC) Improvement Act of 1980 provides another telling example. The Act classified certain line-of-business reports from individual firms as confidential information not subject to FOIA disclosure by the FTC. Pub. L. 96-252, § 3(a)(2), 94 Stat. 374 (1980). The Senate Report accompanying the bill noted the drafters' intent that "the standard for application of Exemption 4 apply here," citing *National Parks* and the "substantial competitive harm" test as the prevailing standard and further stating its intent to take "a similarly realistic view" to classification of confidential information. S. Rep. 96-500, at 10–11 (1979). Likewise, the Committee noted that "no conclusive formula" could be devised but included factors similar to those used by the Omnibus Budget Reconciliation Act. *Id.*

D. In *Chrysler v. Brown*, The Court Declined Calls To Abandon *National Parks*.

Chrysler presented the Court with a clear opportunity to modify or overturn the *National Parks* test, but in a unanimous opinion authored by then-Justice Rehnquist, the Court failed to even cite the case, relying on "the language, logic, [and] history" of FOIA to adopt a flexible approach to Exemption 4 and FOIA exemptions more generally. 441 U.S. at 290–291. *Chrysler* stands as a significant impediment to the Petitioner's reading of the word "confidential," and this Court would likely have to revisit portions of the opinion to adopt Petitioner's reading of FOIA—a path this Court should hesitate to take given the importance of *stare decisis*.[5]

Chrysler was a multifaceted case, but in the main involved an argument that FOIA Exemption 4 could be affirmatively invoked to justify withholding on behalf of a third party opposed to the government's decision to release information. In the first section of the opinion, *Chrysler* concluded that FOIA did not provide an affirmative cause of action for withholding. *Id.* at 290–294. The Court emphasized that it had "consistently recognized

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5. The Court has made plain that while "[*s*]*tare decisis* is not an inexorable command . . . [r]evisiting precedent" is for the most part appropriate only "where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (Alito, J.). None of these factors weigh in favor of revisiting *Chrysler* given its longevity, the reliance of interests of FOIA requesters upon it, and its utter lack of negative treatment by this Court or any lower federal court.

that the basic objective of the Act is disclosure" to support its holding that the exemptions, including Exemption 4, are subject to a balancing test between "open government . . . [and] workable confidentiality in governmental decisionmaking." *Id.* at 290–292. As *Chrysler* explained, "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure," *id.* at 292 n.12 (quoting S. Rep. No. 89-813, at 3 (1965))—a reading in stark contrast to the universal rule proposed by Petitioner that has no flexibility.

Chrysler also failed to overturn *National Parks* despite calls to do so. Indeed, Chrysler's briefs read like a roadmap for Petitioner and its *amici* here—one that failed for Chrysler then and should fail again now. Although the lower court had not addressed *National Parks*, Chrysler asked the Court to eliminate it, citing the case no fewer than eleven times and arguing that the test was "contrary to both the express terms and the legislative history of the exemption." Pet. Br., *Chrysler Corp. v. Brown*, at 19 n.19 (June 5, 1978) (No. 77-922). Chrysler also claimed that predicting competitive harm was "highly speculative" and imposed an "extreme burden of proof" that required submitters to "undertake extensive economic analysis and employ expert witnesses." *Id.* Chrysler's reply brief struggled with the implicit ratification argument, claiming that just because the 1974 FOIA amendments did not touch Exemption 4, this did not mean Congress endorsed *National Parks*. Pet. Reply Br., *Chrysler Corp. v. Brown*, at 15–17 & nn. 17–18 (Oct. 30, 1978) (No. 77-922). Given that *National Parks* was decided shortly before the amendments, the argument that Congress had not implicitly ratified *National Parks* was at least colorable

then. Now, however, subsequent committee hearings show that Congress has actively considered altering this longstanding test and declined to do so.

In support of Chrysler, the Chamber of Commerce also asked the Court to overturn the *National Parks* test. It argued that the "substantial competitive harm" standard was "erroneous" and had "severely limited the effectiveness of the exemption in achieving the protection for business secrets that Congress intended," noting the decision had been heavily criticized by the business community. Br. of Chamber of Commerce as Amicus Curiae Supporting Pet., *Chrysler Corp. v. Brown*, at 23 n.77 (June 8, 1978) (No. 77-922). The Chamber warned the Court to "be aware of the pitfall of unintended approval" of the *National Parks* standard, yet the Court chose to leave the standard in place. *Id.*

E. This Court's Sitting Justices Have Recognized The Need To Defer To Congress's Judgment In The Arena Of FOIA.

This Court's sitting Justices have recognized the special need to defer to Congress's judgment in the context of FOIA. Writing for the panel, Justice Kavanaugh, then serving as a judge on the D.C. Circuit, held that a FOIA requester had exhausted its administrative remedies and could thus seek judicial redress when the government failed to inform the requester in a timely manner the scope of the documents it would disclose and withhold. *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013) (Kavanaugh, J.). Emphasizing the interlocking aspects of FOIA, then-Judge Kavanaugh explained how they

simultaneously "highlight[ed] and unravel[ed]," *id.*, the government's extremely anti-transparency stance that attempted "to keep FOIA requests bottled up in limbo for months or years on end," *id.* at 186–187. The holding "harmoniz[ed]" FOIA's "comprehensive scheme that encourages . . . agency accountability." *Id.* at 189. The opinion acknowledged the practical constraints FOIA imposed on agencies, but "Congress made that decision." *Id.* at 190. "If the Executive Branch does not like it or disagrees with Congress's judgment, it may so inform Congress and seek new legislation." *Id.* (citing *Milner*, 562 U.S. at 581).

Similarly, in *Department of Homeland Security v. MacLean*, 135 S. Ct. 913, 922–923 (2015) (Roberts, C.J.), Chief Justice Roberts, writing for the Court, explained that an analogy drawn between FOIA and an anti-leak law was inapt, recognizing certain "FOIA-specific factors." *Id.* The Court rejected MacLean's analogy between the two statutes because "they ha[d] different language, different histories, and were enacted in different contexts." *Id.* at 923. FOIA's unusual context is a crucial part of this litigation, and this Court should take that background into account in determining the scope of Exemption 4.

II. If This Court Does Modify *National Parks*, FOIA's Pro-Transparency Mandate Means Any Doctrinal Change Must Favor Transparency, Not Opacity.

This Court should not alter the *National Parks* test for the reasons articulated above. If it does, however, any test that replaces it cannot bear resemblance to those proposed by Petitioner or its *amici*, which violate the basic, pro-transparency tenet of FOIA. Two decisions, *Milner* and *Mink*, provide guidance, of what to do, and not

to do, respectively. Running from *Mink* through *Milner* is a constant theme—courts should not rubberstamp government determinations that an exemption applies. Although *National Parks* already strikes an effective balance between independent judicial scrutiny and the protection of third-party information, any standard that this Court creates should maintain meaningful judicial scrutiny over what information qualifies as "confidential."

A. *Milner* Shows That Any Plain Text Reading Must Favor Transparency.

The Court in *Milner* relied on FOIA's plain text to reject a test for Exemption 2, which deals with records "related solely to the internal personnel rules and practices of an agency." 562 U.S. at 564 (quoting § 552(b)(2)). Crucially different from this case, in *Milner*, the Court reached its holding because there was a clear circuit split as to the meaning of Exemption 2. *Id.* at 569. Furthermore, the legislative history was characterized by "dueling committee reports" with respect to the meaning of the word "personnel" and which of the starkly different tests used by lower courts Congress actually endorsed. *Id.* at 574. The Court therefore focused on the "clear statutory language" in light of FOIA's "goal of broad disclosure," and the "narrow compass" with which courts were directed to interpret FOIA's exemptions. *Id.* at 571, 574 (collecting cases). It replaced the challenged test for Exemption 2 with a pro-transparency standard named "Low 2." *Id.* at 571. The Court noted, pointedly, that a contrary decision would "ill-serve Congress's purpose by construing [the exemption] to reauthorize the expansive withholding that Congress wanted to halt" given FOIA's pro-transparency purpose. *Id.* at 571–572.

Importantly, unlike Petitioner's proposed test here, the "Low 2" test also did not arise from thin air but came from the Court's previous decision in *Department of Air Force v. Rose*, 425 U.S. 352 (1976), that had been twisted by lower courts in the service of withholding information more broadly than the *Rose* Court intended. Specifically, in describing Exemption 2, *Rose* held that the exemption "primarily target[ed] material concerning employee relations or human resources." *Milner*, 562 U.S. at 565 (discussing *Rose*, 425 U.S. at 363). *Rose*'s holding extended, according to the Court, only insofar as "the situation is not one where disclosure may risk circumvention of agency regulation." *Id.* at 566 (quoting *Rose*, 425 U.S. at 369). Undermining FOIA's goal of broad disclosure, the D.C. Circuit had adopted *Rose*'s "circumvention" caveat and created its own Exemption 2 interpretation in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981). Dubbing the interpretation "High 2," the D.C. Circuit extended Exemption 2 to shield "predominantly internal materials, whose disclosure would significantly ris[k] circumvention of agency regulations or statutes." *Milner*, 562 U.S. at 566 (internal citations omitted). The Court rejected the D.C. Circuit's departure from *Rose*, holding "that Low 2 is all of 2 (and that High 2 is not 2 at all[])," and noting that "[t]he statute's purpose reinforce[d] this [narrow] understanding of the exemption" given the well-established practice of "constru[ing] FOIA exemptions narrowly." *Id.* at 571.

The government also argued for the Court to adopt an even more expansive interpretation of Exemption 2 dubbed "Super 2." *Id.* at 577. The "Super 2" interpretation would have extended the exemption to "encompass[] records concerning an agency's internal rules and practices for its

personnel to follow in the discharge of their government functions." *Id.* The Court in rejecting the government's "Super 2" test observed it "would extend, rather than narrow, the APA's former exemption . . . which Congress thought allowed too much withholding." *Id.* at 579. "[N]eedless to say," the Court continued, the government's "reading of Exemption 2 violate[d] the rule favoring narrow construction of FOIA exemptions . . . [and] ha[d] no basis in the text, context, or purpose of FOIA." *Id.* at 579–580.

Thus, if this Court were to discard the *National Parks* test, it should implement a new standard that will embody FOIA's "strong presumption in favor of disclosure" in a manner similar to *Milner. See Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quoting *Rose*, 425 U.S. at 361).

B. *Mink* Confirms That Any Test Must Be Tied To The Harms Attributable To Disclosure.

The story of *Mink* shows that Congress did not intend for the judiciary to abdicate its powers of review and rubberstamp the Executive's—or the private sector's—determination that information ought to be withheld. Judicial scrutiny in the context of Exemption 4 requires this Court to give meaning to the 1974 amendments enacted after *Mink*, and to recognize Congress's "inten[t] that the judicial branch have the discretion to weigh the danger . . . [of] disclosure and to question the propriety of executive branch action in classifying a given document, rather than rely on an executive branch classification of the requested record." *S. Comm. on the Judiciary, 95th Cong., Rep. on Oversight Hearings: Agency Implementation of the 1974 Amendments to the Freedom of Information Act*, at 17

(Comm. Print 1980). In recognition of these principles, any new standard that this Court crafts should—in the interest of promoting transparency and disclosure—avoid a "hypertechnical definition" of "confidential," Pet. Br. at 19–20, that allows the government (or a private party) to unilaterally decide what is deemed confidential.

Lower courts reacted to *Mink* by building off the *in camera* and *de novo* review provisions in FOIA. § 552(a)(4)(B); *see, e.g., Allen v. Cent. Intel. Agency*, 636 F.2d 1287, 1299–300 (D.C. Cir. 1980), *overruled on other grounds by Founding Church of Scientology of D.C. v. Smith*, 721 F.2d 828, 830 (D.C. Cir. 1983); *Donovan v. Fed. Bureau of Invest.*, 806 F.2d 55, 59–60 (2d Cir. 1986), *abrogated on other grounds by Dep't of Justice v. Landano*, 508 U.S. 165, 179–180 (1993). These courts recognized the importance of *in camera* and *de novo* review as articulated by Congress, first, because of the inherent information asymmetries between the FOIA requester and the government, and second, because "no other party or institution" apart from the court is "available to ensure that the [government's] assertions are reliable." *See Jones v. Fed. Bureau of Invest.*, 41 F.3d 238, 242–243 (6th Cir. 1994). Indeed, *Jones* explicitly recognized the powerful incentives for agencies to resist disclosure even when disclosure is proper should the information reveal agency misconduct or contain otherwise embarrassing content. *Id.*

The Supreme Court agreed with this reasoning in *Department of Justice v. Landano*, an Exemption 7(D) case Petitioner misreads in support of its interpretation of "confidential." Pet. Br. 19–21. Just as Petitioner argues for a universal definition of "confidential" that "means all such information that is kept private and not publicly

disclosed," *id.* at 21–22, the government in *Landano* similarly argued for a universal rule that all sources for law enforcement should be deemed "confidential," 508 U.S. at 173–175. The Court rejected the government's argument, finding that even though it "may be true that many, or even most, individual sources will expect confidentiality," there was "no explanation, other than ease of administration, why that expectation always should be presumed." *Id.* at 176. The Court found such reasoning "conclusory" and also accounted for considerations of "fairness" that "counsel[ed] against the [g]overnment's rule." *Id.* The Court emphasized that the government's proposed approach in *Landano* for confidential sources was tantamount to creating a "sweeping presumption" that neither "comport[ed] with 'common sense [nor] probability.'" *Id.* at 175 (internal citations omitted).

The same holds true for Petitioner's sweeping presumption here: "Given the wide variety of information that such institutions may be asked to provide," Petitioner's standard "though rebuttable in theory, is in practice all but irrebuttable" because "the requester—who has no knowledge about the particular source or the information being withheld—very rarely will be in a position to offer persuasive evidence that the [submitter] in fact had no interest in confidentiality." *Id.* at 176–177. Instead, a "more particularized approach is consistent with Congress' intent to provide 'workable rules' of FOIA disclosure." *Id.* at 180 (collecting cases). Rather than a "prophylactic rule," to "the extent the [g]overnment[]" could substantiate actual harm flowing from disclosure by introducing sworn affidavits or declarations from someone with personal knowledge, the government could still "attempt to meet its burden." *Id.* Further, these affidavits

have to be tethered to *policy justifications* for keeping the information confidential—in the context of Exemption 7(D) justifications "such as the nature of the crime that was investigated and the source's relation to it." *Id.* "[A]rmed with this information, the requestor [would] have a more realistic opportunity" to argue the information was not, in fact, confidential. *Id.*

Accordingly, to vindicate FOIA's goal of broad disclosure, any new standard should require the government to propound real-world policy justifications for keeping information confidential—justifications that cannot be premised solely on ease of administration or on a theoretical definition divorced from the harm that flows from disclosure. As discussed *supra*, "Congress intended [Exemption 4] to protect . . . financial or commercial information that is privileged and confidential," and in so doing requires agencies to "balance the competitive interest of a business against the public's right to know vital health, safety, economic, and legal information." *S. Comm. on the Judiciary, 95th Cong., Rep. on Oversight Hearings: Agency Implementation of the 1974 Amendments to the Freedom of Information Act*, at 3 (Comm. Print 1980).

Thus, to prevail on an Exemption 4 case, the government should present evidence of non-speculative, non-conclusory harms to a third party that would result from disclosure. Included in this evidence should be a declaration from someone with personal knowledge of the relevant market conditions. Requiring personal knowledge tracks not only existing Exemption 4 case law, *see, e.g.*, *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976) (concluding that Exemption 4 witness

testified based on "conjecture," not "personal knowledge"), but also the 2016 FOIA amendments discussed below. It also complies with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Fed. R. Civ. P. 56(c)(4) ("A[] . . . declaration used to support or oppose a motion . . . must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated."); Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Requiring evidence of non-speculative, non-conclusory harms and a declarant with personal knowledge will properly balance FOIA's broad purpose of disclosure and the competitive interests that a third party possesses in its information.

III. This Case Predates A Major Amendment To The Text Of FOIA In The Form Of The FOIA Improvement Act Of 2016.

This case predates a major amendment to the text of FOIA in the form of the FOIA Improvement Act of 2016. Pub. L. No. 114-185, 130 Stat. 538 (2016).[6] Thus, this Court need not even decide the case and should dismiss the writ as improvidently granted. In the alternative, at

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6. The parties barely noted the amendments because they do not apply to this case. By express text, the amendments "apply to any request for records under section 552 of title 5, United States Code, made after the date of enactment of this Act." FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 6, 130 Stat. 538 (2016). President Obama signed the amendments into law on June 30, 2016, more than five years after Argus Leader submitted the FOIA request at issue here. *See* J.A. at 41.

the very least this Court should clarify in its opinion that its decision has no bearing on the "foreseeable harm" standard because it is not before this Court and any potential decision in this case only risks confusing lower courts for minimal real world effect.

The FOIA Improvement Act of 2016, among other things, codified a "foreseeable harm" standard that is required to withhold information. § 552(a)(8)(A). In pertinent part, the amendment states:

> An agency shall—(i) withhold information under this section only if—(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law.

Id. By its plain terms, the foreseeable harm standard applies to all discretionary exemptions to FOIA, of which Exemption 4 is one per *Chrysler*; *see also* Pet. Br. at 33–34; Br. of U.S. at 32. Congress codified the foreseeable harm standard in 2016, after that standard was long the policy of the Department of Justice ("DOJ") under the Clinton and Obama administrations.[7] As policy, this was subject to change across administrations, so Congress "[b]uil[t]

7. *See* Memorandum from Eric Holder, Att'y Gen. of the U.S., to Heads of Dep'ts & Agencies Regarding the Freedom of Information Act (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf [https://perma.cc/ZC3U-ENDW]; Memorandum from Janet Reno, Att'y Gen. of the U.S., to Heads of Dep'ts & Agencies (Oct. 4, 1993), http://www.fas.org/sgp/clinton/reno.html [https://perma.cc/5BPU-K4R6].

on the [Obama] Administration's efforts" by "codify[ing] the presumption of openness, making it a permanent requirement for agencies, with respect to FOIA." H.R. Rep. No. 114-391, at 9 (2016).

Indeed, the legislative history of the 2016 FOIA amendments reveals a congressional preference to codify a standard at least as exacting as that in *National Parks*. During House debates, members clarified that this "presumption of openness" is linked to the "foreseeable harm" standard because it requires agencies to "compl[y] with the spirit of the law," rather than exercise rigid adherence to the "letter of the law." 162 Cong. Rec. H3717 (daily ed. June 13, 2016). As such, the foreseeable harm standard was the "most important" reform of the Act because it "put[] that spirit into the letter of the law." *Id.* Agencies may thus no longer withhold information "that is embarrassing or could possibly paint the agency in a negative light simply because an exemption may technically apply" and now must "first determine whether they [can] reasonably foresee an actual harm." *Id.* Thus, agencies must now "err on the side of transparency" and end the practice of "withhold[ing]-because-[they]-want-to." *Id.*

I. This Court should not address the scope of the 2016 amendments because the issue is not before it and has not been properly briefed. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 679 (2016) (Roberts, C.J., dissenting) ("If either the plaintiff or the defendant ceases to have a concrete interest in the outcome of the litigation, there is no longer a live case or controversy. A federal court that decides the merits of such a case runs afoul of the prohibition on advisory opinions."); *Snyder v. Phelps*, 562

U.S. 443, 449 n.1 (2011) (Roberts, C.J.) ("The epic is not properly before us and does not factor in our analysis . . . Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic. Given the foregoing and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case."). As mentioned *supra* note 6, Petitioner's merits brief, while excerpting the 2016 foreseeable harm standard, does not discuss it at all. *See* Pet. Br. at 2.

Indeed, the applicability of the foreseeable harm standard on Exemption 4 raises a distinct issue from that discussed in Petitioner's merits brief. Allowing these questions to percolate in the lower federal courts will help the Court understand the impact of the case before it. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., concurring in the denial of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). Therefore, this Court should wait until lower federal courts consider these questions and take a case in the future offering a better vehicle for them.

II. Because this case precedes the 2016 FOIA amendments, it only has the potential to affect nine cases.[8]

8. To find these cases, *amici* conducted three different searches for dockets on Bloomberg Law, a database that draws from PACER, and vetted the populated cases for relevance. The first search was for all open cases, in a federal circuit or district court, filed between January 1, 1966 and present, and for the keyword "552(b)(4)." This search yielded 150 dockets. The second search was for all open cases, in a federal circuit or district court,

The reason it would affect so few cases is because the foreseeable harm standard parallels (if not surpasses) the pro-disclosure nature of the *National Parks* test. Therefore, defining the term "confidential" under Exemption 4 will be inconsequential to FOIA requests that post-date codification of the foreseeable harm standard because agencies and lower courts will have

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filed between January 1, 1966 and present, for the keyword "Exemption 4," and limited to FOIA cases (as segregated by Bloomberg, which marks cases based on the cover sheet of the complaint). This search yielded 77 dockets. The third search was for all open cases, in a federal circuit or district court, filed between January 1, 1966 and present, for the keywords "commercial business information," "commercial confidential information," "National Parks," or "trade secrets," and limited to FOIA cases (as segregated by Bloomberg, per the above). This search yielded 78 dockets. There was considerable overlap of cases in the search results. *Amici* then vetted for relevance, determined by (1) the date of the FOIA request; and (2) the underlying issue in the case. Relevant cases were those with FOIA requests pre-July 1, 2016 and those where confidential commercial information and Exemption 4 were in dispute. Only nine cases met these standards. *See Am. Small Bus. League v. Dep't of Defense*, No. 3:18-CV-01979 (N.D. Cal. Mar 30, 2018); *King & Spalding, LLP v. Dep't of Health & Human Servs.*, No. 1:16-cv-01616 (D.D.C. Aug. 9, 2016); *Humane Soc'y Int'l v. Dep't of Fish & Wildlife Servs.*, No 1:16-cv-00720 (D.D.C. Apr. 18, 2016); *Climate Investigations Ctr. v. Dep't of Energy*, No. 1:16-cv-00124 (D.D.C. Jan. 26, 2016); *Judicial Watch, Inc. v. Dep't of State*, No. 1:15-cv-00687 (D.D.C. May 6, 2015); *Org. for Competitive Markets v. Office of Inspector Gen.*, No. 1:14-cv-01902 (D.D.C. Nov. 12, 2014); *Seife v. Food & Drug Admin.*, No. 1:15-cv-05487 (S.D.N.Y. Jul. 14, 2015); *Project on Predatory Student Lending of the Legal Servs. Ctr. of Harvard Law School v. Dep't of Justice*, No. 2:17-cv-00210 (W.D. Pa. Feb. 14, 2017); *Texas Retailers Ass'n v. Dep't of Agric.*, No. 1:18-cv-00659 (W.D. Tex. Aug 6, 2018).

to engage in a *National Parks*-type analysis, whether through the term "confidential" or through the foreseeable harm standard. The source of law is a distinction with little difference, and such a distinction should not be made when (a) the cost of doing so would be to confuse lower courts on the applicability of the foreseeable harm standard on Exemption 4; and (b) the benefit of doing so could be to affect only nine cases. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.").

This is a unique case, involving a FOIA request made prior to codification of the foreseeable harm standard, *see* J.A. at 41; a stipulation that the withholdings included commercial or financial information, *Argus Leader Media v. Dep't of Agric.*, 224 F. Supp. 3d 827, 832 (D.S.D. 2016); a dispute over whether that information was confidential under Exemption 4, *Argus Leader Media v. Dep't of Agric.*, 889 F.3d 914, 915 (8th Cir. 2018); an agency that declined to defend the district court's decision regarding the confidential information on appeal, *id.* at 916; and a brief by the United States in this Court stating the agency intended to release the information despite Exemption 4, but not under an agency-specific statute, 7 U.S.C. § 2018(c), U.S. Br. at 26, 35, that the Eighth Circuit held did not prohibit disclosure, Resp. Br. at 2. "[B]ecause the present case is so unique, it is hard to see how it meets [this Court's] stated criteria for granting review." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1515 (2018) (Alito, J., dissenting); *see also Rogers v. United States*, 522 U.S. 252,

258–259 (1998) (dismissing case as improvidently granted because question presented was not what it appeared to be in petition for certiorari and did not present an important question of federal law).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Eighth Circuit Court of Appeals, dismiss the writ as improvidently granted, or clarify that its opinion does not reach the FOIA Improvement Act of 2016.

Respectfully submitted,

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APPENDIX

APPENDIX

The amici are legal scholars specializing in FOIA and the First Amendment. They have substantial expertise in issues directly affected by the outcome in this case. These amici are listed below. Institutional affiliations are listed for identification purposes only.

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Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School.

Heidi Kitrosser, Professor of Law, University of Minnesota Law School.

Seth F. Kreimer, Kenneth W. Gemmill Professor, University of Pennsylvania School of Law.

Margaret B. Kwoka, Associate Professor with Tenure, University of Denver Sturm College of Law.

James O'Reilly, Retired Professor, University of Cincinnati College of Law.

Richard Peltz-Steele, Professor, University of Massachusetts School of Law, Dartmouth.

Nelson Tebbe, Professor of Law, Cornell Law School.

No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, d/b/a ARGUS LEADER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER FOOD MARKETING INSTITUTE

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are retail trade associations whose members regularly engage in transactions with Supplemental Nutrition Assistance Program ("SNAP") participants and are thus directly affected by the ruling below. The Eighth Circuit's ruling, following the D.C. Circuit's nebulous *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) standard, would require *amici*'s members to disclose highly sensitive, confidential SNAP sales data at a level of granularity that would seriously harm members' ability to compete in an already highly competitive industry. *Amici* seek here to preserve the confidentiality of this critical data while in the hands of the federal government.

Founded in 1961, the National Association of Convenience Stores (NACS) is a non-profit trade association today representing more than 2,500 retail and 1,600 supplier company members nationwide. NACS is the preeminent representative of the interests of convenience store operators. In 2017, the fuel wholesaling and convenience industry employed approximately 2.5 million workers and generated $601.1 billion in total sales.

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[1] Pursuant to Supreme Court Rule 37, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief. Both parties have consented in writing to the filing of this brief in blanket consents on file with the Clerk.

The National Grocers Association (NGA) is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. Independent retailers are privately owned or controlled food retail companies operating in a variety of formats. They are responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes. The NGA appeared as amicus in the Eighth Circuit in support of petitioner's appeal.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, "Main Street" merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the significant driver of the American economy, supporting 42 million working Americans and contributing $2.6 trillion to the annual GDP. As an association representing the interests of the vital retail industry, NRF advocates for fairness and opportunity for all sectors of retail, no matter their size. NRF regularly advocates for the interests of retailers, large and small, before the legislative, executive, and judicial branches of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Circuit's decision betrays the tenuous protections afforded confidential information under *National Parks* and the attendant need to return to the plain language of the Freedom of Information Act's ("FOIA") Exemption 4. *See* 5 U.S.C. § 552(b)(4) (exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). *National Parks*' atextual standard, which greatly narrows the class of "confidential" information covered by Exemption 4, should not be endorsed by this Court. Instead, as commonly understood, information is "confidential" if it customarily would not be released to the public and the party that provided the information to the government takes reasonable measures to protect against public disclosure. That simple textual standard should apply here.

National Parks departed from a commonsense reading of Exemption 4 in favor of a legislative purpose-oriented interpretation limiting its protection to information that would likely cause substantial competitive harm if disclosed. This standard has proven burdensome and unpredictable for businesses, agencies and the courts, largely because it requires them to speculate about the consequences of events that have yet to occur, often in reliance on limited evidence marshaled in haste. Judicial efforts to ameliorate the burdens and vagaries of *National Parks* have instead exacerbated them. Returning to the simple textual standard for

Exemption 4 protection would comport with this Court's preference for workable, objective rules under FOIA. It would also limit the use of FOIA as a weapon in the commercial intelligence wars, without impairing FOIA's fundamental purpose of enabling the public to ascertain what *government* agencies—as opposed to *private* business competitors—are up to.

Properly construed, Exemption 4 protects retailers' SNAP sales data here because of the significant measures retailers take to protect its confidentiality. Retailers have good reason to do so, since the public availability of SNAP redemption data is likely to give competitors more accurate insights into their SNAP and non-SNAP store sales. But retailers—like any private party who provides information to the government either voluntarily or under compulsion—should not be required to demonstrate anything more than their confidential handling of the data. It is not for government FOIA officials and judges to second-guess a business's reasons for protecting against public disclosure of sensitive business data or to require those businesses to demonstrate the harms they might incur from involuntary disclosure.

Even assuming *National Parks'* "competitive harm" standard applies, the lower courts' application of that standard understates the competitive harm that would likely befall retailers from granting Argus Leader's FOIA request here. The court of appeals reasoned that, in light of other publicly available

information, Petitioner failed to demonstrate that disclosure of SNAP redemption data was likely to cause serious competitive harm. But, in reality, it is *because* other data is publicly available that SNAP redemption data can cause such harm. Each tile in the mosaic of available competitive data improves the models that are used to predict competitors' sales and target competitors' customers. The court of appeals recognized that possibility, but erroneously discounted it as insufficient to support relief. FOIA's Exemption 4 was not intended to give a court this power to substitute its judgment for that of a private business.

Amici submit this brief in support of Petitioner to correct the Eighth Circuit's misconstruction of FOIA Exemption 4 and ensure the protection of its members' confidential store-level SNAP redemption data. That result is best assured here by rejecting *National Parks'* standard and holding Exemption 4 satisfied when parties that provide information to the government demonstrate that they take reasonable steps to protect against its public disclosure.

ARGUMENT

I. THE COURT SHOULD RETURN TO THE PLAIN MEANING OF "CONFIDENTIAL" UNDER EXEMPTION 4

A. "CONFIDENTIAL" INFORMATION IS INFORMATION THAT WOULD CUSTOMARILY NOT BE RELEASED TO THE PUBLIC

FOIA's Exemption 4 is one of several (like Exemption 6) designed to protect private information in the hands of the government. Congress enacted FOIA to provide a means for citizens to know what their government is up to. *See FBI v. Abramson*, 456 U.S. 615, 621 (1982). At the same time, Congress realized that the goal of governmental transparency does not justify unfettered access to *private* information, the public release of which could harm legitimate public and private sector interests. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Exemption 4 thus affords protection to those persons who provide sensitive information to the federal government, while also seeking to ensure that the government has access to the information necessary to perform its broad functions. Exemption 4 thus exempts from FOIA disclosure any "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

Given this plain text, the application of Exemption 4 would seem simple. And, at least at the

beginning, it was. "Initially, the courts adopted a broad interpretation of the term 'confidential' under FOIA Exemption 4." *See* Peter R. Maier, Guest Article, "The Case Against *National Parks*," DOJ FOIA Update, Vol. IV, No. 4 (1983). Early courts interpreting the statute "deemed commercial information to be confidential within the meaning of Exemption 4 if it was furnished to the government with the expectation of confidential handling by the submitter and received by the government under a promise of confidential treatment." *Id.* (citing, *e.g.*, *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970); *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)).

The ordinary understanding of the statute's confidentiality requirement is consistent with these early decisions. "Confidential" information is information that is "communicated *in confidence*" or "*intended* to be held in confidence or kept secret." WEBSTER'S SECOND INT'L DICTIONARY 560 (1937) (emphasis added & alterations omitted)).

Under the ordinary meaning of "confidential," then, the expectations of the producing party are essential to determining FOIA's protections. As a House Committee report explained, the commercial confidentiality provision was intended to "exempt[] such material if it would not customarily be made public by the person from whom it was obtained by the Government." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *see also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (exemption protects commercial

information that "would customarily not be released to the public by the person from whom it was obtained"); *see also Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971).

B. THE *NATIONAL PARKS* STANDARD DOES NOT ADEQUATELY PROTECT CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION

In *National Parks*, the D.C. Circuit moved away from the plain language meaning of "confidential" to a more legislative purpose-oriented definition. *See National Parks*, 498 F.2d at 767 ("A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption."). The court identified two relevant legislative purposes—"that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy," *id.*—and molded the statute's "confidentiality" requirement to fit those purposes.

As relevant here, based on its reading of the legislative history, the court reasoned that Exemption 4 was intended to "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* at 768. Thus, it engrafted onto Exemption 4's "confidentiality" requirement the test that has generally controlled lower courts' consideration of Exemption 4 determinations: Commercial or financial material is "confidential" if "disclosure of the information is

likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770.[2]

This *National Parks* standard requires private parties, government agencies and, ultimately, the courts to engage in the inherently speculative effort of predicting the consequences of events that have not yet occurred—*i.e.*, whether substantial competitive harm is likely to be caused by government disclosure of previously non-public information to the public. This effort often requires complex economic forecasts and is burdensome for both private parties and government agencies.

For businesses, the risk of an adverse outcome resulting in damaging public disclosures is magnified by statutorily established procedural burdens. For agencies and courts, the burden of adjudicating multitudes of Exemption 4 disputes is compounded by limitations on their knowledge regarding a vast range of relevant competitive markets.[3] As a result,

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[2] *National Parks* sought to protect the government's interest in obtaining confidential data as well, by protecting commercial and financial information where disclosure is likely "to impair the Government's ability to obtain necessary information in the future." *National Parks*, 498 F.2d at 770. That prong is not at issue in this case.

[3] USDA agencies alone applied Exemption 4 more than 400 times in 2017. *See* USDA 2017 Annual FOIA Report, Table V.B.(3); *see also, e.g.*, U.S. DOD 2017 Annual FOIA Report,

(Continued ...)

National Parks does not reliably or effectively preserve the confidentiality of the information that the statute was intended to protect.

First, the procedural burdens imposed by FOIA and the APA make it difficult for private businesses to protect confidential data in the hands of the government. FOIA requests generally encompass large numbers of documents containing numerous separate items of information, and a business notified of a FOIA request (as required by Executive Order 12600 (1987)) must try to prove to the agency that substantial competitive harm is likely to result from disclosure of each type of confidential information covered by the request, in most cases before the 20-day statutory deadline for the agency's response to the requester.[4] This submission must be complete and compelling because there may be no further opportunity to submit evidence. If the agency decides against the business that submitted the data to the government, its only recourse at that point will be challenging the agency decision in district court on the existing agency record and under the

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Table V.B.(3) (989 Exemption 4 cases); U.S. DOL 2017 Annual FOIA Report, Table V.B.(3) (3686 Exemption 4 cases).

[4] 5 U.S.C. § 552(a)(6)(A)(i) requires agencies to make determinations on FOIA requests within 20 working days, and limits extensions of that time period to "unusual circumstances." Businesses can request additional time for their submissions in opposition to disclosure, but cannot rely on receiving this purely discretionary relief.

APA's highly deferential arbitrary and capricious standard. 5 U.S.C. § 706(2)(A).[5] These procedural disadvantages handicap most businesses' efforts to protect their confidential information.

On the other side of the ledger, FOIA *requesters* have no obligation to tell agencies why they want the information they have requested. Yet these FOIA requesters are often competitors seeking to further their own commercial interests.[6] The ability of competitors to pursue FOIA requests for private data in the hands of the government has transformed FOIA into a powerful weapon in the commercial war for market dominance.[7]

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[5] Unlike agency decisions to *withhold* confidential information, which can be challenged de novo under 5 U.S.C. § 552(a)(4)(B), decisions to *disclose* a business's confidential information may only be challenged under the APA.

[6] *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 Penn. L. Rev. 1097, 1103 & n.33 (2017) ("Public-oriented inquiries by concerned citizens and their advocates . . . make up only a small fraction of the 700,000-plus FOIA requests submitted each year. Studies have consistently shown that the bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents, or the regulatory environment.") (footnotes omitted).

[7] *See* Pozen, *supra* n.6, at 1103; *cf.* Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 958 (1974) (observing that the "benefits of the Act have inured predominantly to ... corporation[s] seeking through disclosure an economic, competitive or legal advantage").

Second, these same handicaps often impair the agencies' predictive efforts, which are based on necessarily hastily assembled, incomplete responses, performed by overtaxed agency FOIA officers often unfamiliar with the competitive landscape and lacking in probative evidence from those who know best how the requested information would be used—the competitors themselves. FOIA officers lack firsthand knowledge of the relevant competitive context, and they have neither the time nor the training to digest the nuances of the non-uniform case law applying *National Parks*. Although some agencies make valiant efforts to get it right (as the USDA did here), others get it very wrong. *See, e.g.*, *McDonnell Douglas v. NASA*, 180 F.3d 303, 306 (D.C. Cir. 1999) (NASA's rationale for predicting no likelihood of substantial competitive harm deemed "too silly to do anything other than state it, and pass on") (Silberman, J.).

Finally, in light of these many challenges, judicial review of agency predictions under *National Parks* yields inconsistent and unpredictable results. *See* U.S. Dep't of Justice, Office of Info. Policy, Department of Justice Guide to the Freedom Of Information Act, Exemption 4 at 309-13 (FOIA Guide), https://www.justice.gov/oip/doj-guide-freedom-information-act-0 (showing different outcomes in cases with similar fact patterns, sometimes resulting from "balancing" extraneous factors such as the "public interest"). As the FOIA Guide recognizes, "[t]he courts have tended to resolve

issues of competitive harm on a case-by-case basis rather than by establishing general guidelines." *Id.* at 309. All too often, courts fall back on rejecting as "speculative" competitive harm predictions which, by the very nature of the inquiry, cannot help but involve speculation. *See, e.g.*, Pet. App. at 21a (district court concluding that "any potential competitive harm from the release of SNAP data is speculative at best"); *see also id.* at 5a (court of appeals dismissing aspect of FMI's prediction of competitive harm as "speculative").

National Parks thus imposes a considerable burden on the courts. Each year, thousands of FOIA requests implicating Exemption 4 are submitted to federal agencies.[8] As a result, the courts are annually burdened with hundreds of cases challenging the agencies' resulting predictions of the likelihood of substantial competitive harm, either via de novo trials (as in the instant case) or via APA review of inadequate administrative records (in "reverse-FOIA" cases). This puts judges in the untenable position of deciding whether a business that has determined to devote very substantial time and resources to seeking judicial protection of its private business information is completely misguided in doing so.

In 1992, the *en banc* D.C. Circuit acknowledged the problems with the *National Parks* standard but

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[8] *See* note 3, supra.

deemed them insufficient under principles of *stare decisis* to justify setting aside the decision entirely. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877 (D.C. Cir. 1992); *see also id.* at 880 (Randolph, J. concurring) (noting "the test announced in *National Parks* . . . incorrectly interpreted Exemption 4 of the Freedom of Information Act," but concluding that stare decisis counsels against overruling the decision). In doing so, however, the *Critical Mass* court sought to "greatly simplify the application of Exemption 4" by confining the *National Parks* inquiry to *compulsorily* submitted information. For voluntarily submitted information, *Critical Mass* returns the Exemption 4 "confidentiality" inquiry to the plain meaning of that term, asking whether the information "would customarily not be released to the public by the person from whom it was obtained." *Id.* at 878.

This voluntary/involuntary distinction has only added to the complexity and uncertainty of Exemption 4 litigation. It has engendered further hair-splitting legal inquiries, such as whether the voluntary acceptance of a requirement to submit information (as by submitting a contract proposal in accordance with the terms of a government request for proposals) constitutes voluntary or compulsory submission of information. *See, e.g., McDonnell Douglas v. NASA*, 180 F.3d at 305-06; *see also* FOIA Guide at 278-97 (containing 15-page discussion of post-*Critical Mass* cases wrestling with voluntariness issue).

Moreover, by disfavoring compulsorily submitted information, *Critical Mass* turns the protection of confidential business information on its head. Businesses should not be placed at a disadvantage in trying to protect their valuable confidential information when the government has obtained it by force of law and thus deprived those private parties of any ability to weigh the risks and benefits of providing it. While the voluntary/involuntary distinction of *Critical Mass* may have some relevance to the *government's* interest in *obtaining* information, it matters little to the businesses that want to protect their confidential data at all times. *Critical Mass* thus got the standard right, but was mistaken in extending it only to voluntarily provided information. This Court can correct that error by applying *Critical Mass*'s "not customarily released to the public" standard to *all* Exemption 4 cases.

C. THE PLAIN LANGUAGE OF EXEMPTION 4 PROVIDES A WORKABLE STANDARD THAT WILL NOT "SWALLOW FOIA NEARLY WHOLE"

At the same time it conforms to Congress's meaning, defining "confidentiality" in terms of the reasonable expectations of the submitter also establishes a simple workable rule for the parties, the agencies, and the courts. In opposing certiorari, Argus Leader expressed concerns about the "subjectivity" of a plain meaning confidentiality standard (see Opp. Cert. at 30-34). Those concerns can be allayed by requiring agencies to ascertain that

the source of the information has taken reasonable measures to protect it from public disclosure.

Determining whether a business took reasonable measures to protect its confidential information is a simpler, more manageable task for government officials, who are already required to follow strict protocols to guard against the release of certain private and sensitive information. *See, e.g.*, Privacy Act, 5 U.S.C. § 552a; 18 U.S.C. § 798 (prohibiting disclosure of classified information). As evident from the plain language of Exemption 4, Congress desired this simplicity. A submitter is well positioned to provide—even on short notice—ample evidence to establish that it protects information as secret. There will be less need to march in lawyers and economic experts to hypothesize what third parties might do with the information if they got their hands on it and what harms may thus befall the submitter.

As evident in this case, allowing agencies to apply a straightforward "confidentiality" test—determining that the submitter took reasonable measures to protect the secrecy of the information—also "serve[s] a pragmatic function, encouraging participation in activities that involve the collection of sensitive information." Studies of Welfare Populations: Data Collection and Research Issues, ch. 8, at 230 (The National Academies Press 2001), https://www.nap.edu/read/10206/chapter/10. Food retailers who know that reasonable measures to protect against disclosure are not enough to satisfy Exemption 4 may be less inclined to participate in

SNAP. *See id.* at 230-31 ("Guarantees of confidentiality are considered essential in encouraging participation in potentially stigmatizing programs."). Thus, as this case illustrates, more rigorous confidentiality protections may prevent withdrawal from critical government programs. *See, e.g.*, Doc. 59-13 at 8 ("The potential for SNAP redemption data to cause both competitive and reputational harm to the Kmart brand, and any future stores operated by Kmart, will be a major factor in Kmart's decision to continue participating in the SNAP program.").

Experience with *Critical Mass* illustrates the workability of this standard. Exemption 4 litigation following *Critical Mass* has only rarely posed substantial questions about whether information is of a kind not customarily released to the public. *See* FOIA Guide at 293-96. This is as it should be, given FOIA's "purpose of expediting disclosure by means of workable rules." *U.S. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 779 (1989).[9]

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[9] In contrast, as noted above, the *National Parks* standard has resulted in case-by-case, inconsistent rulings. For these reasons, applying the straightforward confidentiality test will not interfere with any settled expectations (because the unpredictable *National Parks* standard has engendered none), but rather will at last enable businesses to reliably predict how their confidential information will be treated when requested under FOIA.

As for the Eighth Circuit's fear that FOIA would be "swallow[ed] nearly whole" by applying the plain meaning (see Pet. App. at 4a-5a n.4), this conclusion is patently absurd in light of the vast range of government-originated information unaffected by Exemption 4. Petitioner has correctly pointed out that these governmental information requests constitute the majority of FOIA requests. *See* Pet. at 21 n.15. In any event, *Critical Mass* has not completely immunized all privately generated information from FOIA disclosure in cases decided under its "not customarily released to the public" standard. *See, e.g., Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 80-81 (D.D.C. 2001) (voluntarily submitted information not protected by Exemption 4 because it was identical to information that was already publicly available).

Finally, the federal government is not powerless to require disclosure where appropriate. Both Congress and the Executive Branch can, through specific statute or rule, require disclosure of particular types of privately generated information residing in government files. *See, e.g.*, 16 U.S.C. § 824t (requiring Federal Energy Regulatory Commission to disseminate pricing information collected from utilities); 48 C.F.R. § 52.227-14 (mandatory government contract clause regarding government's rights to receive and disclose technical data developed by contractors). The difference in those instances where the government exercises that authority is that both parties, private and government, understand in advance that information

submitted will be disclosed. Insofar as there is ever any public interest in disclosure of privately generated information, it thus can and should be dealt with on a particularized basis rather than by using the indiscriminate *National Parks* standard, which inefficiently and unfairly inflicts a broad range of damaging and unwarranted disclosures on the private sector.

II. SNAP STORE-LEVEL REDEMPTION DATA IS EXEMPT FROM DISCLOSURE BECAUSE RETAILERS TREAT IT AS PRIVATE AND CONFIDENTIAL

The SNAP redemption data at issue in this case easily satisfies the plain meaning definition of "confidential" financial data. Indeed, such "business sales statistics" are at the core of the confidential commercial data that Congress thought protected by Exemption 4. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (exception meant to protect "business sales statistics, inventories, customer lists, and manufacturing processes"). The record below demonstrates the wisdom of Congress's judgment.

First, the data at issue is customarily maintained as confidential by retailers. "There is *no place* where [competitors] can get the actual data" of a store's SNAP sales. (Doc. 186 at 32:3-4 (emphasis added)).[10]

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[10] "Doc." cites are to the district court docket on PACER. The full trial transcript was filed in the district court, but certain portions are not accessible on PACER. Those portions include testimony from Peter Larkin (CEO of the National

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There is good reason for retailers' protection of store-level SNAP redemption data. Retailers adopt strong measures against public disclosure to protect their market shares and maintain profitability. Food retailers, in particular, operate on "razor-thin" margins, with average net (pre-tax) profits under one percent. Doc. 139-1 at 3; Doc. 186 at 11:23-12:7; Doc. 185. Confidentiality of store-level sales information is critical in light of the fierce competition retailers face from superstores, drug stores, warehouse clubs, small format/limited assortment grocery stores, and more recently, internet-based food delivery services. There is a "relatively inelastic amount of dollars in any given market that are available for food at home," and when a new competitor succeeds in taking away SNAP business, "[i]t has to be at somebody's expense." (Doc. 186 at 27:9-16, 30:11-16).

A retailer's customer base is a valuable asset built over many years by providing excellent customer service and developing in-depth understanding of customer preferences and trends. Food retailers know that if competitors obtain store-level sales data, they can more readily secure a foothold in a local market and target the customers of existing retailers. *See* Doc 185 at 173:16-19 ("I mean sales is what we're all after. When you figure

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Grocers Association) and Joey Hays (owner of Dyer Foods, Inc., a supermarket chain in Tennessee), and are identified as "Doc. 185" herein.

out where the sales are, then we go after it a little bit harder. I don't want anybody to know our sales.").

As a result of these concerns, food retail stores regularly adopt and enforce reasonable policies and procedures to maintain the secrecy of their SNAP redemption data. According to NGA's CEO Peter Larkin, a store's sales information, including SNAP redemption data, is not publicly available and is confidential, closely guarded information. (Doc. 185). In fact, this secrecy does not involve mere avoidance of public disclosure. Sales data is often kept secret from internal company personnel that do not have a need to know the data. Such information is not typically known "beyond just a couple of people." (Doc. 186 at 17:1-13).

SNAP redemption data is usually maintained by retailers on a strict "need-to-know" basis. A senior executive at Cumberland Farms, Inc., a convenience store chain in the Northeast, testified that less than 5% of its employees have access to the company's SNAP redemption data, and disclosure of that data outside the company requires a nondisclosure agreement. (Doc. 59-11 at 6). Dyer Foods, which operates 13 stores in small towns in Tennessee, keeps SNAP redemption data "private" because once you "figure out where the sales are, then [you] go after [that market] a little bit harder." (Doc. 185; *see also* Doc. 119 at 9:19-12:12 (describing Sears Holding Management Corporation's measures to maintain confidentiality of sensitive business information, including store-level sales)).

Moreover, electronic benefit transfer (EBT) processors, which handle the processing of SNAP transactions, are duty bound to safeguard the secrecy of SNAP redemption data. EBT processors play a central role in the handling of SNAP transactions. When a benefit recipient swipes the electronic payment card at a point-of-sale device, the details of the purchase are transmitted from the retailer to the EBT. The EBT processor confirms the retailer is an authorized SNAP-participant, checks the amount of benefits available, and instantly transmits an approval (or denial) to the retailer. (Doc. 118 at 7:14-8:18, 9:23-10:10).

Each state contracts with an EBT processor to administer SNAP benefits for citizens of that state. The agreements between states and their EBT processors include strict confidentiality provisions directed at retailer information, such as store-level SNAP redemption data, that EBT processors are required to send to USDA. For instance, Arkansas's EBT agreement provides:

> [The] Contractor must treat all information, and *in particular* information relating to *retailers*, all applicants for and recipients of human services . . . and providers of such services . . ., which is obtained by it through its performance under the Contract, as *private or confidential*

> *information* . . . and shall restrict access to and disclosure of such Information in compliance with federal and state laws and regulations.

(Doc. 186 at 4 (Trial Ex. 202, at pp. 17-18) (emphasis added)). The agreement specifically prohibits the EBT processor from using any such information "in *any* manner except as necessary for the proper discharge of its obligations." (*Id.* at 17 (emphasis added)).

Even where retailers and their associations retain third-party researchers to analyze sales data, measures are taken to preserve strict confidentiality. "Retailers are often reticent to provide sales data because they are concerned this data could be used by their competitors to gain an advantage, an understandable concern given the tight margins of food retailers." Molly De Marco, Ph.D., et al., *A Researcher's Checklist for Working with Sales Data to Evaluate Healthy Retail Interventions*, DUKE-UNC USDA CTR. FOR BEHAVIORAL ECON. & HEALTHY FOOD CHOICE RESEARCH, June 2017, at 4, https://becr.sanford.duke.edu/research-hub/becr-briefs. "Because of this very salient concern to retailers, it is essential to explain how the research team will keep a retailer's sales data . . . secure and confidential." *Id.* *Amicus* NACS itself collects and publishes extensive industry information for the benefit of its members, "but not before an extraordinary degree of aggregation and anonymization." Doc. 59-11 at 15. Members provide

their sensitive financial information only "on the explicit and repeated condition that it will be kept 'completely' and 'strictly' confidential." *Id.*

Retailers thus participate in SNAP with the expectation that their store-level redemption data will be kept confidential. *See, e.g.*, Doc. 59-10 at 1-2, Doc. 59-12 at 1-2, Doc. 59-16 at 2-3, Doc. 59-17 at 1-2, Doc. 59-18 at 1-2. As one witness put it, "when our members signed up for the program, they *always* felt that it was confidential, private, and it was *never* going to be released." Doc. 186 at 32:5-7 (emphasis added). Under the plain meaning of "confidential," food retailers' reasonable expectations that their private sales data will remain private are sufficient to warrant the protections of Exemption 4.

III. SNAP DATA SHOULD BE PROTECTED FROM DISCLOSURE EVEN UNDER *NATIONAL PARKS*

Even assuming this Court retains *National Parks*' standard, the Court of Appeals erred in its application. Relying on *National Parks*, the Court of Appeals concluded that plaintiffs had not demonstrated that the disclosure of SNAP redemption data was likely to cause substantial harm to the competitive position of retailers from whom the government obtained the information. Pet. App. at 4a-5a. The court did so based on trial evidence it read to show that the grocery store industry "is already rich with public-available data that market participants use to model their

competitor's sales." Pet. App. at 5a. While the court allowed that "releasing the contested data is likely to make the statistical models marginally more accurate," it reasoned that this marginal improvement is insufficient to show a likelihood of substantial competitive harm. *Id.*

But contrary to the Eighth Circuit's legal conclusion, it is *because* so much other information is readily available that the individual store SNAP redemption data has such competitive value. Every bit of information about competitors' sales helps form a clearer picture of a store's bottom line. The volume of a target store's SNAP redemptions helps competitors derive more accurate estimates of that store's *overall* sales, which is the crown jewel of confidential business information. Testimony below confirmed that "retailer-specific transactional data from SNAP sales could be combined with other existing public information . . . to reasonably approximate total gross revenues for [that] retailer."[11]

Injecting this additional piece of information enhances the accuracy of research models designed

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[11] Doc. 59-11 at 16; *see also* Doc. 59-13 at 7 ("The SNAP redemption data could also provide our competitors with insight with respect to individual Kmart stores' profits."); Doc. 185 (knowing a store's SNAP sales data is "helpful" and can give a competitor "a better estimate" of its total sales); *id.* (SNAP redemption data gives competitors a "back door into determining what your sales are").

to evaluate a particular market. (Doc. 119 at 26:8-9 ("I would say that from the perspective of market research, the more information you can get, the better.")). When inserted into predictive models that utilize other available information, store-level SNAP redemption data improves the accuracy of what otherwise is often simply an educated guess. (Doc. 186 at 133:20-137:19). That accuracy helps both other potential market entrants and existing stores to evaluate competitive opportunities.

In this sense, the confidential data here is much like a tile in the mosaic of competitive data. In other contexts, this "mosaic" theory has been used to protect from FOIA disclosure what might otherwise appear in isolation to be innocuous government data. As this Court recognized in the national security context, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Sims*, 471 U.S. 159, 178 (1985) (applying FOIA Exemption 1); *see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928-29 (D.C. Cir. 2003) (applying mosaic theory under law enforcement Exemption 7). "Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978). While the stakes may not be as high in the food industry as they are at the CIA or FBI, the competitive exploitation of information is much the same. Far

from a "nominal effect on competition," Pet. App. at 18a, store-level sales data is an important piece of a larger competitive puzzle.

The Department of Justice has recognized that the mosaic theory can be applied to Exemption 4's "competitive harm" inquiry. *See* FOIA Guide at 315. "Some courts have utilized a 'mosaic' approach to sustain a finding of competitive harm, thereby protecting information that would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester." *Id.* at 315 & n.313 (citing, *e.g.*, *Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557, 559 (D.D.C. 1980) (protecting data reflecting sales between parent company and its subsidiary, because even if disclosing such data "would be insufficient, standing by itself, to allow computation of the cost of production, this could would be ascertainable when coupled with other information.")).

Determining where to focus resources in the supercompetitive retail market—such as the decision where to site a retail food store—is not a precise science. While many sources of information are available to retailers, including firms that specialize in analytics such as market potential analysis, demographic, census, and customer profiling, store-level sales data, including SNAP redemption data, remains closely guarded. Sales information is "the most important information . . . in the decision whether to enter into a new market or not or buy a new store." (Doc. 185 at 171:2-5). The government's

release of SNAP redemption data is a "game-changer" (Doc. 186 at 17:21) that is "very, very dangerous fuel" in the marketplace (Doc. 185 at 255:3).

As petitioner Food Marketing Institute explained below, disclosure provides retailers "with valuable insights into the operational strengths and weaknesses of their competitors resulting in selecting pricing, market concentration, expansion plans and possible take-over bids facilitated by the knowledge [of the store-level SNAP data]." (Doc. 59-4 at 1-2). Moreover, if a store's SNAP redemption data reflect a long-term trend of decreasing sales, "it would be reasonable for the competitors to extrapolate from that trend that the store is vulnerable and its market position weak," making it "more likely that the potential competitor would open a competing store in an area." (Doc. 59-8 at 3 (T. Gresham, CEO of Double Quick)).

Bruce Kondracki, the USDA's expert and VP of Consumer Research at Dakota Worldwide Corporation,[12] explained how software-based predictive modeling for "repositioning" a retailer's stores in the market is at the cutting edge of industry research. High-tech modeling is premised on balancing the model's "demand side" with the "supply side"; while the demand side is relatively

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[12] Dakota is one of the longest serving market research firms serving the food industry. (Doc. 186 at 121:13-18).

simple to calculate and "fairly predictable" (*e.g.*, population, demographics, street and highway networks), the supply side "is, by far, the most time-consuming and most expensive part and most inaccurate part of the whole modeling process." (Doc. 186 at 128:11-132:6). Store-level sales factor in the supply side, and "without [an] accurate supply side, you'll never balance the model." (*Id.* at 130:19-24).

If researchers know the *precise* amount of a competitor's store-level sales, a research firm like Dakota (hired by a competitor retailer) can engage in reverse engineering by continually tweaking the model's algorithms (using other known variables such as demographics and income). (*Id.* at 134:3-135:9). The updated model can then be used to predict *the client's* sales if it opened a store across the street. (*Id.* at 136:12-22). The client can "then . . . play God," searching an entire marketplace and testing possible expansion locations to determine what "a particular threshold for a store's sale performance" would be *before* pulling the trigger and breaking ground at that site. (*Id.* at 131:24-132:6). Such enhanced models will result in greatly diminished risk for new market entrants. (*Id.* at 137:1-19). It is for this reason that the industry so jealously guards against disclosure of this information. And it is for this reason that one additional data point in the universe of publicly available information could do substantial harm to retailers, who are compelled to provide this information to the government.

At the same time, the dollar value of SNAP redemptions at each of the quarter-million plus SNAP-authorized retailers across the country will not shed any additional light on what the *government* is up to. Argus Leader—and anyone with an internet connection—can already ascertain the aggregate dollar value of SNAP redemptions at the national, state, and even zip code level. (Doc. 118 at 42:14-21, 99:22-100:4).

CONCLUSION

This Court should reverse the Eighth Circuit's decision, discard the *National Parks* test in favor of a plain meaning definition of "confidentiality," and hold that the data at issue in this case is "confidential" commercial or financial data protected by FOIA Exemption 4.

Respectfully submitted,

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No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA D/B/A ARGUS LEADER,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS NEW HAMPSHIRE RIGHT TO LIFE IN SUPPORT OF RESPONDENT

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RULE 29.6 STATEMENT

Petitioner New Hampshire Right to Life ("NHRTL") is a New Hampshire not-for-profit corporation that has no parent company.

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INTEREST OF AMICUS CURIAE[1]

New Hampshire Right to Life (NHRTL) seeks to foster respect for life from the moment of fertilization to natural death. It educates its members and the public through ongoing public-record requests and analyses, including the problems with and abuses in taxpayer funding of abortion clinics.

Previous requests under the Freedom of Information Act, 5 U.S.C. 552, have revealed that the federal Department of Health and Human Services was—and perhaps still is—reimbursing Planned Parenthood for birth control drugs at approximately 388% the rate the same drugs were being sold to the public at Walmart. NHRTL used this information to educate the public and campaign to stop the wasteful taxpayer funding of abortion clinics. Other public record requests have shown that Planned Parenthood was spending hundreds of thousands of dollars lobbying and promoting increased taxpayer funding of its clinics and the election of abortion-on-demand politicians.

Americans deserve to know how the federal government is spending their hard earned tax money and if that money is being funneled to groups that are misusing it. Unfortunately, not all of NHRTL's

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[1] Pursuant to Supreme Court Rule 37(6), amicus states that no party other than the amicus and its counsel authored this brief in whole or part nor contributed money that was intended to fund preparing or submitting this brief. Both parties have consented in writing to the filing of this brief in blanket consents on file with the Court.

Freedom of Information Act (FOIA) requests have been fully successful. Many documents regarding how much certain abortion clinics charge the taxpayer and how the clinics ultimately spend their taxpayer funds have been withheld under a broad, atextual application of FOIA's Exemption 4. *E.g.*, *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 49–52 (1st Cir. 2015); *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 384 (2015).

NHRTL will have future FOIA requests that courts will similarly deny if this Court allows the lower courts' broad, atextual reading of Exemption 4 to continue. Accordingly, NHRTL has a strong interest in the courts applying FOIA as Congress wrote it. Interpreting Exemption 4 in accord with its plain meaning will result in the transparency that Congress intended while allowing all citizens to know how the government spends their tax dollars.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The public has a right to know how its government acts and decides to spend taxpayer dollars. An agency cannot secretly award contractors millions of dollars in public funds without public scrutiny of that spending.

Recognizing this reality, Congress enacted FOIA, 5 U.S.C. 552. The statute operates "to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The law's primary purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). FOIA accomplishes this by broadly mandating disclosure unless one of nine narrow exemptions specifically applies. Exemption 4, at issue in this case, exempts "trade secrets and commercial or financial information[,] obtained from a person [that is] privileged or confidential." 5 U.S.C. 552(b)(4).

Several courts of appeal have refused to narrowly apply Exemption 4's text and have instead greatly broadened the statutory exemption—thereby limiting the public's access to information—to preclude disclosure whenever a third party alleges that disclosure of public knowledge may result in "substantial harm." *Nat'l Parks & Conservation Ass'n*

v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). This is contrary to FOIA's purpose and plain text.

Instead of piercing the veil of administrative secrecy, atextual judicial standards for applying Exemption 4 tend to shield government contractors so they do not face competition that could save the American taxpayer millions of dollars. *E.g.*, *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 49–52 (1st Cir. 2015) (Title X funding to abortion clinics); *Canadian Commercial Corp.* v. *Dep't of Air Force*, 442 F. Supp. 2d 15, 33 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008) (defense funding); *Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (leasing of land); *Hodes* v. *U.S. Dep't of Treasury*, 342 F. Supp. 3d 166, 174 (D.D.C. 2018) (collection of delinquent taxes). The federal courts should apply FOIA as written and not create tests by judicial fiat that broaden the statutory language.

Amicus New Hampshire Right to Life agrees with Petitioner Food Marketing Institute that this Court should reject the *National Parks* test. Nevertheless, contrary to Petitioner's arguments, rejecting *National Parks* does not require this Court to overrule the Eighth Circuit's judgment. Exemption 4's plain text does not shield any information a private party deems "confidential." It applies only to trade secrets, privileged information, and information Congress has actually designated confidential via statute or by properly authorized regulation.

This Court should hold that information is "confidential" only when the government has determined, via statute or rule, that such information must be held in confidence. Such a rule is consistent with (1) the statutory text, (2) how Exemption 4 was interpreted before *National Parks*, and (3) how this Court has interpreted "confidential" in Exemption 7 for purposes of "confidential informants" in criminal investigations. See *U.S. Dep't of Justice* v. *Landano*, 508 U.S. 165, 172 (1993). Courts should not guess at whether the release of public documents might harm a future commercial interest. It is only when the government, through a statute or duly authorized regulation, accords public records confidential status that Exemption 4 applies.

Allowing government contractors to self-servingly designate all of their applications for taxpayer funds "confidential" is illogical and has no basis in the statutory text. It would only worsen the problem of government contractors avoiding both public oversight and competition for public funds.

Although the Eighth Circuit wrongly applied the *National Parks* test, this Court should affirm its judgment. Congress could have, but did not, designate the information sought in this case as confidential. That reality is readily apparent from the fact that, *after* the FOIA request was made in this case, and the Eighth Circuit had held 7 U.S.C. 2018 inapplicable to the information requested, Congress amended 7 U.S.C. 2018 to arguably deem that, prospectively, the requested SNAP retailers' redemption

information would be deemed confidential and not subject to disclosure. Agric. Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490; Pet. Br. 45 n.29.

Petitioner argues that this amendment made the requested information more clearly confidential, Pet. Br. 45 n.29; the Respondent argues that the amendment does not change the applicability of the statute to the requested documents, Resp. Br. 17–23. But this Court need not address this dispute because Petitioner never appealed the Eighth Circuit's 2014 decision that 7 U.S.C. 2018(c) is not applicable to the requested documents. "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) (quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984)). Since no question presented asks whether 7 U.S.C. 2018(c), either originally or as amended, precluded the disclosure of the information, it is not before the Court.[2]

Accordingly, the requested information is not "confidential" for purposes of Exemption 4 or any of the other FOIA exemptions. USDA is obligated to produce the documents to Argus Leader.

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[2] The Eighth Circuit rejected USDA's original argument that the SNAP statute, 7 U.S.C. 2018, made the requested documents exempt under FOIA Exemption 3. *Argus Leader Media* v. *U.S. Dep't of Agric.*, 900 F. Supp. 2d 997 (D.S.D. 2012), rev'd and remanded, 740 F.3d 1172 (8th Cir. 2014). This decision was never appealed. USDA then argued that the information was exempt under Exemption 4. So, the only issue in this appeal is whether Exemption 4 applies.

ARGUMENT

I. The *National Parks* standard ignores FOIA's plain text and has proven unworkable in practice.

FOIA allows citizens to see how their government works, including how their government spends taxpayer dollars. It requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Fed. Open Mkt. Comm. of Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 351–52 (1979). "[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 151 (1989); accord *FBI* v. *Abramson*, 456 U.S. 615, 616 (1982) ("FOIA exemptions are to be narrowly construed").

Nevertheless, when it comes to Exemption 4, several courts of appeal have refused to narrowly apply the text and have instead greatly broadened the statutory exemption to preclude disclosure whenever a third party alleges that public knowledge may result in "substantial harm." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). This is contrary to FOIA's plain text and purpose.

Making matters worse, the courts of appeals have applied *National Parks* inconsistently. Some courts have made Exemption 4 even broader than *National Parks* already did.

On one hand, the Fourth, Fifth, and Eighth Circuits apply the *National Parks* test in its original form. These circuits require that harm be "substantial" and result from "actual competition" before allowing Exemption 4 to prevent disclosure. *E.g.*, *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (where a "contract is not awarded competitively, the prospect of competitive injury from releasing [the documents] is remote."); *Sharyland Water Supply Corp.* v. *Block*, 755 F.2d 397, 399 (5th Cir. 1985) (competition with other water suppliers is "insignificant"); see also *Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th Cir. 2018) (information that may be "marginally" helpful to competitors will not result in "substantial" harm).

On the other hand, the First Circuit has expanded *National Parks* to bar disclosure whenever a third party alleges the possibility of some future harm from theoretical competition for government grants. *N.H. Right to Life*, 778 F.3d at 49–52; see also *Canadian Commercial Corp.* v. *Dep't of Air Force*, 442 F. Supp. 2d 15, 33 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008). This rule has transformed FOIA from a disclosure statute to a withholding statute.

Specifically, the First Circuit held that Planned Parenthood's Manual of Medical Standards and Guidelines was exempt from disclosure under Exemption 4. *N.H. Right to Life*, 778 F.3d at 49–52. Planned Parenthood submitted that manual as part of a noncompetitive grant request for over $1 million tax-payer dollars, making it a public record. Because

the First Circuit theorized that disclosing the manual may possibly harm Planned Parenthood's competitive position in some hypothetical future grant application, it held that Exemption 4 applied. This holding was unrelated to Exemption 4's text or even the *National Parks* test as written. Yet the holding allowed Planned Parenthood to shield its manual from public disclosure. The *National Parks* test has thus taken on a life of its own, resulting in a cloak of secrecy surrounding how abortion clinics spend federal tax dollars in New Hampshire.

What's more, the problem is neither limited to New Hampshire nor federal funding of abortion clinics. Lower-court decisions have precluded taxpayers from seeing how their money is being used in a broad variety of contexts, in many jurisdictions. For example, the D.C. District Court applied *National Parks* to exempt from disclosure contractor application materials that would show how much the IRS pays to third-party debt collectors for certain types of collection. *Hodes*, 342 F. Supp. 3d at 174. The court held that if inflated prices were disclosed, the current contractor would be harmed as it "would enable competitors to (1) gain insight into the awardees' pricing strategy and (2) underbid the awardees in future competitive bidding processes for IRS debt collection or other similar contracts." *Id.* at 176.[3]

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[3] Just a few years ago, another court rejected a similar argument. *Raher* v. *Fed. Bureau of Prisons*, 749 F. Supp. 2d 1148, 1158–61 (D. Or. 2010) (finding argument that a "competitor could use the redacted information to inform its bidding in future

In other words, if the public knew how much the taxpayer was overpaying on this contract, the IRS would receive competitor applications to provide the same service for less. That is precisely the type of publicly beneficial information that Congress ordered to be disclosed.

The Tenth Circuit held that *National Parks* precluded disclosure of lease terms for the storage of nuclear fuel for a similar reason: if the federal government's terms were made public, it would result in others "undercutting prices" in future applications. *Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001). But turning the light on how the government spends taxpayer funds is precisely what FOIA is designed to accomplish.

The D.C. District Court likewise held that "disclosure of Northrop Grumman's proposed wrap rates [for NASA] would permit competitors to undercut Northrop Grumman's bids" in future federal contract requests. *Northrop Grumman Sys. Corp.* v. *Nat'l Aeronautics & Space Admin.*, 346 F. Supp. 3d 109, 119 (D.D.C. 2018). Accord, *e.g.*, *Canadian Commercial Corp.* v. *Dep't of Air Force*, 442 F. Supp. 2d 15, 33 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008) (public disclosure of prices charged by Air Force contractor would result in contractor's costs and

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competition for similar contracts . . . to be no more than a theoretical possibility.") While application of the substantial competitive harms test of *National Parks* should be rejected in total, the fact that it appears to have been broadened in recent years makes it all the more troubling.

pricing information being undercut by competitors for future air force contracts). Many courts have similarly withheld the disclosure of pricing information in government contracts because the current contractor might be underbid by less expensive competitors, even though disclosure saves taxpayer money. And even in those circuits where *National Parks* is applied more narrowly, that standard mandates the atextual analyses of whether any competitive harms to a third party are "substantial." *E.g.*, *Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th Cir. 2018).

This *post hoc*, case-by-case analysis also results in substantial delays in obtaining public documents as the parties fight over which competitor harms are, in fact, substantial. For example, in the present case, the SNAP documents at issue were requested in 2011 and the Eighth Circuit did not issue its decision until seven years later in 2018. The Argus Leader still has not received the requested documents that pertain to the 2005 to 2010 fiscal years.

The FOIA statute does not envision the passage of several years before the public actually receives requested documents. The statute requires that agencies "shall make the records *promptly* available." 5 U.S.C. 552(a)(3)(A) (emphasis added). In fact, the statute requires agencies to respond to requests within 20 days.[4] 5 U.S.C. 552(a)(6)(A). The *National*

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[4] Though the original deadline was 10 days, the time period was increased to 20 days in amendments adopted in 1996. Electronic Freedom of Info. Act Amendments of 1996, Pub. L. No. 104–231, 110 Stat. 3048.

Parks test makes it practically impossible to comply with the statutory timeframes. Before an agency releases documents, the business submitter is entitled to a reasonable period of time to make objections. Executive Order 12600; 45 C.F.R. 5.42. If the agency makes a disclosure decision and the business submitter disagrees, it is entitled to further time to make objections that preserve the confidentiality of the questioned documents. Executive Order 12600. The *National Parks* standard leads to substantial delays in the disclosure of information regarding how the federal government spends the public's money.

In sum, the judiciary's Exemption 4 expansion has resulted in less disclosure and increased secrecy involving government contracting and grants. That outcome thwarts "the protection of the public fisc[, which] is a matter that is of interest to every citizen." *Brock* v. *Pierce Cty.*, 476 U.S. 253, 262 (1986). "[A] democracy cannot function unless the people are permitted to know what their government is up to." *Mink*, 410 U.S. at 105 (Douglas, J., dissenting).

Congress did not write Exemption 4 to help government contractors secretly overcharge the government. FOIA is a tool that ensures "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This Court should reject the *National*

Parks test and instead interpret Exemption 4 narrowly according to its plain language.

II. The term "Confidential" in Exemption 4 should be narrowly construed.

In *National Parks* and its progeny, the courts of appeal chose to read Exemption 4 as broadly as possible to maximize protection of government vendors. That approach was wrong. When interpreting other FOIA exemptions, this Court has repeatedly recognized that they "are to be narrowly construed." *Abramson*, 456 U.S. at 616; *Tax Analysts*, 492 U.S. at 151 ("[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass."). Consistent with the rest of FOIA, the Court should apply the same narrow approach to Exemption 4's interpretation.

In drafting Exemption 4, Congress did not broadly exempt all information that a business working as a government contractor may wish to keep confidential. Congress certainly did not broadly exempt any information that may harm such a business. It only exempted "trade secrets and commercial or financial information[,] obtained from a person [that is] privileged or confidential." 5 U.S.C. 552(b)(4). This Court should interpret these words narrowly.

As a starting point, this means that government contractors do not decide what information FOIA requires them to disclose. Contra, *e.g.*, Marine Mammals Br. 29 ("The word 'confidential' in Exemption 4 should be construed to mean that

whatever information a party designates and treats as 'confidential.'") Such an approach is hardly narrow. And it leads to a fox-in-the-henhouse problem: any government contractor engaged in fraud or overbilling has unilateral veto power over any public request for information. There is nothing in Exemption 4's plain language that even suggests Congress intended such an anti-disclosure outcome when enacting a FOIA statute designed to increase government transparency.

In addition, under the doctrine of *noscitur a sociis*, a word in a statute is known by the company it keeps. *Lagos* v. *United States*, 138 S. Ct. 1684, 1688–89 (2018). Here, the word "confidential" appears in context with the word "privileged." Privileged information, such as documents disclosed as part of an attorney-client or priest-penitent relationship, is considered virtually sacrosanct, necessitating the strongest public-policy reasons to overcome the privilege and mandate disclosure. The word "privileged" should be similarly construed. If Congress wanted to do so, it could have easily exempted all commercial or financial information that a contractor provides to the government. Congress rejected that approach.

Accordingly, this Court should interpret Exemption 4 narrowly as encompassing only truly "confidential" information, similar to inherently-privileged documents. Under this standard, commercial or financial information pertaining to the payment of government funds to a private entity is the easy case. Such data necessarily implicates not

only the commercial and financial interests of the contractor, but also the disclosure and transparency interests of the government and the public. As the United States recognized in its amicus brief: "In this case, store-level SNAP-redemption data necessarily corresponds to the government's own payments of federal funds (through EBT processors) to the stores. That fact significantly diminishes any basis for finding the information to be 'confidential' for purposes of Exemption 4." U.S. Br. 26. Congress did not write FOIA to shield the public from knowing how the government spends taxpayer dollars.

III. Whether information is categorized confidential should depend on statutes and regulations, not contractor discretion.

Before the *National Parks* decision, courts looked to Exemption 4's text and held that the government could withhold commercial documents in response to a FOIA request only where there was an "express or implied promise by the government that the information will be kept confidential." *Gen. Servs. Admin.* v. *Benson*, 415 F.2d 878, 881 (9th Cir. 1969). This is a practical and easy-to-apply rule that has the added benefit of being consistent with how this Court has interpreted other FOIA exemptions.

A test based on the express or implied promise of confidentiality is similar to the standard that this Court announced in *Landano*, 508 U.S. at 172. There, this Court held, for the purposes of FOIA Exemption 7, that a law enforcement agency's "confidential

source" is considered confidential only when there has been an explicit or implied assurance of confidentiality. It would be passing strange to hold that government contractors receive greater protection from FOIA disclosure than the government's criminal informants.

Consistent with *Landano*, a promise of confidentiality must be made by someone authorized to make such a promise. A promise by an official not authorized to act cannot be used to thwart public access to information about how taxpayer dollars are spent. This Court long ago recognized that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power." *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). Individual officials cannot by practice or pronouncement deem information confidential. Accordingly, there must be a statute or duly-promulgated regulation on point.

For example, in 41 C.F.R. 60-40.3, the Department of Labor ruled "portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public." In

other words, the DOL by promulgated rule brought a certain category of information within Exemption 4's scope. Similarly, the USDA adopted a rule categorizing as confidential applications for agricultural research funding. Under 7 C.F.R. 3430.21, "[n]ames of submitting institutions and individuals, as well as application contents and evaluations, will be kept confidential." Accord, *e.g.*, 7 C.F.R. 278.1(q)(3)(iv) (designating social security numbers and related records as "confidential").

Congress also can and has specifically designated categories of information to be confidential by statute. 26 U.S.C. 6103(a), for example, provides that tax returns and return information "shall be confidential." 42 U.S.C. 299b-22 provides that hospitals' patient safety work product "shall be confidential." 35 U.S.C. 122(a) provides that "applications for patents shall be held in confidence." 7 U.S.C. 2426 likewise provides that "[a]pplications for plant variety protection and their contents shall be kept in confidence." See also 15 U.S.C. 57b-2; 7 U.S.C. 2619; 7 U.S.C. 4912. Congress has determined in several different categories—including arguably the information at issue here (prospectively)—that certain commercial information should be confidential and not released in response to a FOIA request.

In the present case, the USDA argued that it had made promises of confidentiality regarding the SNAP benefits through its "long standing policy." Decl. of Div. Dir. Andrea Gold, JA 71–72. But in the absence

of any statute or promulgated rule stating that policy, such an affidavit is legally insufficient to create a categorical exemption that would deprive the public of important information about government contracts and contractors.

Alternatively, the USDA initially argued, and the District Court initially held, that the SNAP statute, 7 U.S.C. 2018,[5] made the requested documents exempt under FOIA Exemption 3. *Argus Leader Media* v. *U.S. Dep't of Agric.*, 900 F. Supp. 2d 997 (D.S.D. 2012), rev'd and remanded, 740 F.3d 1172 (8th Cir. 2014). The Eighth Circuit reversed, holding that while the SNAP statute made some documents exempt from disclosure, it did not affect the documents Argus Leader was requesting. That holding, which was correct, was allegedly the impetus for Congress to deem the documents confidential in future cases. See Agric. Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat 4490; see also Pet. Br. 45 n.29; but see Resp. Br. 17–23 (arguing the statutory amendment does not apply). The fact that Congress statutorily designated certain information confidential shows that such determinations can be made when appropriate.

So, whether information should be shielded from public scrutiny because disclosure would result in

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[5] That statute provides: "Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter."

substantial competitive harm is a legislative decision, not a judicial determination. Congress not only can but has actively deemed certain information confidential. Courts should follow its lead rather than determining confidentiality on a case-by-case basis.

* * *

This Court should reject the *National Parks* test and interpret Exemption 4 according to its plain language. Relying on hypothetical harms to government contractors has prevented uncovering thousands of overpriced contracts and saving millions in taxpayer funds. Expanding Exemption 4 to exempt any information a contractor deems confidential exacerbates the injury to FOIA, the public fisc, and all tax payers.

Just as this Court has interpreted "confidential" in Exemption 7 to apply only when a properly authorized government actor has given an informant assurance of confidentiality, the term "confidential" in Exemption 4 only applies when Congress by statute or an agency through regulation has provided an assurance of confidentiality. The Eighth Circuit's judgment in *Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th Cir. 2018), should be affirmed not because it correctly applied *National Parks*, but rather because, at the time of the request, neither Congress nor USDA had deemed the information "confidential."

CONCLUSION

The court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, AND COLLABORATION FOR RESEARCH INTEGRITY AND TRANSPARENCY IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are three organizations that submit Freedom of Information Act (FOIA) requests and rely on agencies' FOIA disclosures to access information about the government's work protecting consumer and patient health. Amici submit this brief to highlight that petitioner Food Marketing Institute's (FMI) position—that the longstanding understanding of exemption 4 should be rejected in favor of a far broader reading—threatens to undermine important health and safety interests, including the ability of the public to hold federal agencies accountable and to ensure effective government oversight of food, drugs, and related products.

Public Citizen is a consumer advocacy organization with members and supporters in all 50 states. Since its founding in 1971, Public Citizen has supported government transparency and relied on FOIA as an important tool for learning about government activities. In particular, Public Citizen uses FOIA to obtain information about federal agencies' regulation of products that impact consumers' health and safety, often through FOIA requests for information submitted to agencies by regulated entities, such as pharmaceutical or automobile companies. Public Citizen has used information obtained through FOIA to advocate for government action to better protect the public and to alert the public about public health and safety concerns. Public Citizen has significant expertise in FOIA practice, and it has litigated many FOIA cases, including cases involving exemption 4.

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Counsel for both parties have consented in writing to its filing.

The Center for Science in the Public Interest (CSPI) is a nonprofit, nonpartisan consumer advocacy organization. CSPI conducts research, promotes evidence-based policies, and provides consumers with current, useful information related to their health. CSPI uses FOIA to obtain information that nongovernment entities submit in order to help the public make better informed decisions and to petition agencies to remove dangerous ingredients from the market. CSPI routinely uses FOIA to garner information related to foodborne illness.

The Collaboration for Research Integrity and Transparency (CRIT) is an interdisciplinary initiative of Yale Law School, Yale Medical School, and Yale School of Public Health. CRIT's mission is to promote public health by improving the transparency and integrity of biomedical and clinical research. CRIT regularly uses FOIA to obtain information from the Food and Drug Administration and other agencies because such data helps reveal regulatory failures that put Americans' health and safety at risk. This information is often submitted by pharmaceutical and medical device companies and other non-governmental entities, potentially implicating exemption 4. CRIT attorneys have also litigated FOIA suits challenging the FDA's withholding of such information, including data on the safety and efficacy of FDA-approved drugs that is used by researchers to evaluate both the drugs and the FDA regulatory process.

SUMMARY OF ARGUMENT

FOIA was enacted to help "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute

achieves this goal by requiring agencies to disclose records in response to requests, 5 U.S.C. § 552(a)(3), and by requiring agencies to disclose certain records proactively, *id.* § 552(a)(1)–(2), subject to nine exclusive exemptions, *id.* § 552(b).

At issue here is exemption 4, which exempts from disclosure two categories of information: "trade secrets" and "commercial or financial information obtained from a person and privileged or confidential." *Id.* § 552(b)(4). The definition of "confidential" adopted by the D.C. Circuit 45 years ago in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and now applied by every Circuit to have considered the issue, Pet Br. 38 & nn.23 & 24, properly construes exemption 4 to encompass only commercial or financial information disclosure of which would cause substantial competitive harm. The language of exemption 4 as a whole, FOIA's purpose, and its legislative history confirm the *National Parks* definition of "confidential."

In stark contrast to FMI's reading of exemption 4, the *National Parks* standard is a crucial tool that enables the public to learn "what their government is up to." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (emphasis omitted) (citation omitted). Members of the public regularly use FOIA to obtain vital public health and safety information submitted to the government by non-governmental entities. Such information often provides context for government action and inaction, allowing the public to assess the effectiveness of government regulation, to petition the government to take action where necessary, and to make better informed choices. As described below, the *National Parks* standard properly allows the public access to a great deal of information concerning federal agencies' work to protect public health

and safety. Much of that vital information would likely be inaccessible to the public under FMI's proposed reading.

Additionally, the longstanding construction of exemption 4, applied for decades by courts nationwide, is sensible and workable. FMI's contrary argument amounts to little more than a policy disagreement with Congress about the scope of exemption 4. The current construction of exemption 4 reflects the balance struck by Congress between disclosure and privacy; FMI's alternative construction would result in an expansive exemption favoring broad withholding, contrary to FOIA's purpose, as reiterated by this Court.

ARGUMENT

I. The *National Parks* standard properly defines the scope of FOIA exemption 4.

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The statute does not define "trade secrets," "commercial or financial information," "privileged," or "confidential." *See id.* In the absence of a statutory definition, *National Parks* correctly looked to the text, the statutory purpose, and the legislative history to conclude that whether information submitted to the government falls within exemption 4 is not determined simply by "[w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained." 496 F.2d at 767. Rather, aside from trade secrets, commercial or financial information, unless it is privileged, is protected as "confidential" under exemption 4 if disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained." *Critical Mass Energy Project v.*

Nuclear Regulatory Comm'n, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc) (quoting *National Parks*, 498 F.2d at 770)).

The *National Parks* standard has been uniformly adopted by every court of appeals to have considered the issue. *See 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7–10 (1st Cir. 1983); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *OSHA Data/CIH, Inc. v. DOL*, 220 F.3d 153, 162 & n.24 (3d Cir. 2000); *Acumenics Research & Tech. v. DOJ*, 843 F.2d 800, 807 (4th Cir. 1988); *Cont'l Oil Co. v. Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975); *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984); *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001); *Pac. Architects & Eng'rs Inc. v. U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990); *Sharkey v. FDA*, 250 F. App'x 284, 288 (11th Cir. 2007).

A. As with any question of statutory construction, consideration of the scope of a FOIA exemption starts with the statutory text. *Milner v. Dep't of the Navy*, 562 U.S. 562, 569 (2011). FMI relies almost exclusively on dictionary definitions of "confidential" as the basis for its assertion that the term encompasses any information that is "kept private and not publicly disclosed." Pet. Br. 17–19. But the text of exemption 4 is not limited to a single word. The relevant provision exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Respondent's brief discusses the statutory text at length, and we will not repeat those arguments here.

Statutory text, however, must be read in its proper context, not viewed in isolation. *Koons Buick Pontiac GMS*

v. Nigh, 543 U.S. 50, 60 (2004) (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). "[T]he plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 135 S. Ct. 1074, 1081–82 (2015) (plurality opinion) (brackets omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

The context of FOIA strongly supports the longstanding narrow reading of "confidential." This Court "ha[s] often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be 'given narrow compass.'" *Milner*, 562 U.S. at 571 (quoting *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989)); *see also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001) ("These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." (internal brackets omitted) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976))); *DOJ v. Landano*, 508 U.S. 165, 181 (1993) (explaining the Court "has an obligation to construe FOIA exemptions narrowly in favor of disclosure"). FMI's proposed definition is irreconcilable with the Court's repeated statements, over many decades, that the exemptions should be narrowly construed. Its reading of exemption 4 would swallow virtually all information submitted by non-governmental entities. If "confidential" information meant *all* information that is "kept private and not publicly disclosed," Pet. Br. 16, the only submitted information that would fall outside exemption 4 would be information that is *already* publicly disclosed—for which there is no need for a FOIA request. Thus, un-

der FMI's reading, exemption 4 would have the same effect as if it exempted "all commercial or financial information obtained from a person."

Consideration of the context of FOIA also undercuts the government's proposed alternative definition of "confidential"—that information is also "confidential" if a government official led the submitter to expect that the government would not publicly disclose it. *See* U.S. Br. 15. The government's proposed definition finds little support in the language of exemption 4, which the government effectively revises to make nearly every word superfluous. And the theory that, in a statute enacted to mandate disclosure of government information, subject only to specifically stated exemptions, Congress chose to allow agency employees to deem a wide swath of information exempt at will or whim turns FOIA on its head. Such a reading of exemption 4 stands in marked tension with FOIA's purpose, as repeatedly acknowledged by this Court.

As the Court has recognized, FOIA marked a sea change in the public availability of government records. *See Klamath Water Users Protective Ass'n*, 532 U.S. at 16 ("In FOIA, after all, a new conception of Government conduct was enacted into law, 'a general philosophy of full agency disclosure.'" (quoting *Tax Analysts*, 492 U.S. at 142)). FOIA's predecessor "was plagued with vague phrases," allowing the government, for example, to withhold any information that, in its sole judgment, "requir[ed] secrecy in the public interest." *EPA v. Mink*, 410 U.S. 73, 79 (1973) (internal quotation marks omitted). "In enacting the FOIA, Congress intended 'to curb this unbridled discretion' by 'closing the loopholes which allow agencies to deny legitimate information to the public.'" *Tax Analysts*, 492 U.S. at 151 (internal quotation marks and brackets omitted) (quoting *GTE Sylvania, Inc. v. Con-*

sumers Union of U.S., Inc., 445 U.S. 375, 385 (1980)). Allowing the government to determine unilaterally whether to deem information "confidential" would give the government the "unbridled discretion" that Congress sought to end. *See Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970) ("When Congress acted to close those loopholes [by enacting FOIA], it clearly intended to avoid creating new ones.").

Taking into account both "the specific context in which ['confidential'] is used, and the broader context of [FOIA] as a whole," *Yates*, 135 S. Ct. at 1081–82, the courts of appeals have properly construed "confidential" information, under exemption 4, to mean information the disclosure of which would "cause substantial harm to the competitive position of the person from whom the information was obtained."[2] *National Parks*, 498 F.2d at 770.

Importantly, this case presents significantly different circumstances from those in *Milner v. Department of the Navy*, where the Court rejected a contention that the D.C. Circuit's interpretation of exemption 2 should stand because it "'ha[d] been consistently relied upon and followed for 30 years' by other lower courts." 562 U.S. at 575 (quoting *id.* at 585 (Breyer, J., dissenting)). The D.C. Circuit's interpretation of exemption 2 had only been adopted by

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[2] *National Parks* also defined "confidential" information to include information disclosure of which would "impair the Government's ability to obtain necessary information in the future." 498 F.2d at 770. Here, the government disclaims any argument that future government impairment should be considered under exemption 4. U.S. Br. 19–20 ("The government's ability to obtain *other* information in the future does not determine whether the particular commercial information at issue in the FOIA request is currently 'confidential.'"). Amici agree that government impairment is not properly considered under exemption 4, which is concerned with harm to non-governmental entities that submit information to the government.

three additional circuits, and three other circuits had reached a *contrary* conclusion, resulting in "a 4 to 3 split among the Circuits." *Id.* at 576–77. Here, by contrast, *National Parks* has been accepted by *every* circuit to have considered the issue: Ten circuits have adopted *National Parks* in published opinions, and one has applied it in an unpublished case. Pet. Br. 38 nn.23 & 24.

Moreover, the interpretation of exemption 2 challenged in *Milner* broadened that exemption, essentially creating an additional exemption. That result ran directly counter to FOIA's purpose and this Court's case law requiring that "exemptions be 'given a narrow compass.'" *Milner*, 562 U.S. at 571 (quoting *Tax Analysts*, 492 U.S. at 151). Here, FMI asks the Court to do the opposite: reverse a longstanding *narrow* construction to make the exemption substantially broader. In light of FOIA's text and purpose, the Court should definitively reject this result.

B. FMI posits that exemption 4 may include a "buffer zone"—that is, that Congress may have crafted exemption 4 more broadly than necessary, ensuring protection for records the disclosure of which could cause substantial competitive harm by providing protection for a far broader category of records. Pet. Br. 27 n.14. This suggestion runs counter to the many cases directing that the exemptions be narrowly construed. *See supra* pp. 6–7.

Furthermore, the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, explicitly forecloses assertions that records may be exempt under exemption 4 even if they do not implicate the interests Congress sought to protect in enacting the exemption. In that Act, Congress amended FOIA to, among other things, raise the threshold for withholding. The Act directs that an agency "shall withhold information under [FOIA] only if—(I) the agency reasonably foresees that disclosure

would harm an interest protected by an exemption"; or "(II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A). Because the 2016 Act applies only to FOIA requests made after the date of enactment, *see* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 6, 130 Stat. 544–45, this provision does not apply to the 2011 FOIA request at issue here. App. 10a. Nonetheless, section 552(8)(a) applies to most pending FOIA requests (all those submitted after June 30, 2016).[3]

Accordingly, as to information submitted by a commercial entity, even if information sought through FOIA constitutes "confidential" commercial or financial information, the agency may now only withhold the information if it can establish that it is reasonably foreseeable that disclosure will "harm an interest protected by" exemption 4. 5 U.S.C. § 552(a)(8)(i)(I).

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[3] As the Senate Committee Report that accompanied the FOIA Improvement Act of 2016 makes clear, § 552(a)(8) "codifies the policy established for releasing Government information under FOIA by President Obama when he took office and confirmed by Attorney General Holder in a March 19, 2009, Memorandum to all Executive Departments and Agencies." S. Rep. No. 114-4 (2015), *as reprinted in* 2016 U.S.C.C.A.N. 321, 327–28. The Holder Memorandum referenced in the Committee Report instructed each agency not to withhold information "merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Attorney General Memorandum for Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,878, 51,879 (Oct. 8, 2009). Because the Holder Memorandum was guidance to federal agencies concerning under what circumstances the Department of Justice would defend withholdings and was "not intended to, and [did] not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against" the federal government, the memorandum speaks in terms of what agencies "should" and "should not"—rather that they "must" or "cannot"—do under this standard. *Id.* 51,879–82. With this standard now codified, the instruction is now mandatory.

Section 552(a)(8) confirms exactly the approach the D.C. Circuit took in *National Parks*, which declined to construe exemption 4 in isolation from the interests Congress sought to protect in crafting it. In *National Parks*, the D.C. Circuit looked not only at the single word "confidential" but at the congressional purpose in enacting exemption 4. *See* 498 F.2d at 767–70. The court first explained "the various exemptions included in the statute serve two interests—that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy." *Id.* at 767. While some exemptions "serve only one or the other of the two interests," the D.C. Circuit concluded that exemption 4 "is intended to protect interests of both the Government and the individual." *Id.* In examining the interest of non-governmental entities that exemption 4 sought to protect, the D.C. Circuit determined the relevant "interest" was the protection of "valuable business information," i.e., information disclosure of which would cause competitive harm. *Id.* at 768.

In short, numerous principles of statutory construction support the courts of appeals' longstanding construction of exemption 4. As those courts have properly held, information can be withheld under exemption 4 as "confidential" commercial or financial information only if disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770.

II. FMI's construction of exemption 4 threatens to prevent disclosure of information vital to the protection of public health and safety.

Both FMI and the government argue that release of information submitted to agencies by sources outside the government does not serve FOIA's "core purpose" of "disclosure of agency records that 'contribut[e] significantly

to public understanding *of the operations or activities of the government*,'" and that restricting disclosure of this information therefore will not impede FOIA's aims. U.S. Br. 16 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994)); *see* Pet. Br. 33–35. But they misunderstand the critical role played by information obtained from non-governmental entities. It is not information that just happens to be in the government's possession, but information that informs government decisionmaking and often determines government policy. As Congress recognized in passing the Paperwork Reduction Act of 1980:

> [M]any federal programs attempt to serve large numbers of people in a variety of ways, such as protecting civil rights, providing decent housing and ensuring safe and healthy working conditions. In those and other areas, Congress has made critically important commitments to the people of this nation. In order to be effective, many of those programs must collect information from the public in order to make intelligent decisions on standards, benefits and other government actions.

S. Rep. No. 96-930 at 3 (1980), 1980 U.S.C.C.A.N. 6241, 6243.

Public disclosure of information submitted by a company, in turn, is often necessary to know what the "government is up to." It elucidates the basis for government action or inaction, and can reveal whether the government is effectively doing its job, whether it is efficient or wasteful, and whether a regulator is subject to "agency capture." Applying exemption 4 as long construed by the D.C. Circuit and other circuits has often enabled watchdog organizations and journalists to obtain this valuable information through FOIA. These disclosures have catalyzed

government action for public benefit and allowed the public to make better informed health and safety decisions about regulated products. In this way, disclousres through FOIA under the longstanding reading of exemption 4 have played an important role in supporting vital public protections.

Although agencies have some discretion to release exempt information, *see, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979), the real-world history of FOIA shows that agencies seldom exercise that discretion to disclose when the submitter objects—evidenced by the abundance of exemption 4 litigation and the paucity of "reverse-FOIA" lawsuits, in which a submitter sues the agency in an effort to block disclosure of the information it submitted.[4] Moreover, some agency regulations are explicit that the agency will not discretionarily disclose confidential commercial or financial information. *See* 21 C.F.R. § 20.61(c) ("Data and information submitted or divulged to the [FDA] which fall within the definitions of a trade secret or confidential commercial or financial information are not available for public disclosure."). Thus, FMI's broad construction of exemption 4 would drastically curtail public access to information in the hands of federal agencies, creating risks to public health and safety. Examples abound in connection with government oversight of food, drugs, and medical devices.

Data on Dangerous Opioid Use. In 2011, the Food and Drug Administration (FDA) created a Risk Evaluation

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[4] Amici's Westlaw search for reverse-FOIA cases since 1999 found 27 such cases over that 20-year period. *See also* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm. & Mary L. Rev. 679, 717 n.176 (2002) (finding only 64 reported reverse-FOIA cases between 1979 and 2002, of which only 40 went to judgment).

and Mitigation Strategy (REMS) designed to oversee prescribers of a class of drugs known as Transmucosal Immediate Release Fentanyl (TIRF).[5] These are fast-acting formulations of the highly addictive drug fentanyl that pose serious risks, and the FDA has only approved them for a narrow category of opioid-tolerant cancer patients.[6] The goal of the REMS is to "mitigate the risk of misuse, abuse, addiction, overdose and serious complications due to medication errors" by "[p]rescribing and dispensing TIRF medicines only to appropriate patients."[7]

Dr. Caleb Alexander, a professor at the Johns Hopkins Bloomberg School of Public Health, filed a FOIA request seeking information related to the REMS for a number of prescription drugs, including TIRFs.[8] Citing exemption 4, the FDA withheld certain documents and redacted others, claiming they contained confidential commercial information.[9] When Dr. Alexander, with the help of amicus

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[5] *See* FDA, *Transmucosal Immediate Release Fentanyl (TIRF) Risk Evaluation and Mitigation Strategy (REMS)* (last modified Aug. 2017), https://www.accessdata.fda.gov/drugsatfda_docs/rems/TIRF_2017-09-07_Full.pdf.

[6] *See Selected Important Safety Information*, TIRF REMS Access (last visited Mar. 7, 2019), https://www.tirfremsaccess.com/TirfUI/rems/safetyInformation.action ("TIRF medicines are indicated only for the management of breakthrough pain in adult cancer patients 18 years of age (16 years of age and older for Actiq brand and generic equivalents) who are already receiving and who are tolerant to around-the-clock opioid therapy for their underlying persistent cancer pain.").

[7] FDA, *Transmucosal Immediate Release Fentanyl (TIRF) Risk Evaluation and Mitigation Strategy (REMS)*, *supra* n.5.

[8] Jeffrey E. Rollman et al., *Assessment of the FDA Risk Evaluation and Mitigation Strategy for Transmucosal Immediate-Release Fentanyl Products*, 321 JAMA 676, 677 (2019).

[9] *Id.*

CRIT, administratively appealed and argued the agency had failed to show the competitive harm required under exemption 4, the FDA released an additional 1,065 pages.[10] The documents revealed that the FDA had evidence that these drugs were being prescribed to patients who did not have cancer or were not opioid-tolerant and, thus, were outside the narrow group of people for whom the FDA had determined the drugs were safe.[11] Yet the FDA had taken only minor steps to address this dangerous off-label use of these drugs[12] and did not review the prescribing records of any physicians to consider disqualifying them from the program.[13]

These revelations sparked an outcry from journalists, academics, and congresspersons—ultimately prompting the FDA to review the TIRF REMS.[14] Dr. Alexander testified before an FDA advisory committee about the lack of

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[10] *Id.*

[11] *Id.* at 681–83.

[12] *Id.* at 681–82.

[13] Johns Hopkins University Bloomberg School of Public Health, *Study Finds Inadequate FDA Oversight of Prescribing of Fentanyl Products*, Medical Xpress (Feb. 19, 2019), https://medicalxpress.com/news/2019-02-inadequate-fda-oversight-fentanyl-products.html.

[14] *See, e.g.*, Emily Baumgaertner, *F.D.A. Did Not Intervene to Curb Risky Fentanyl Prescriptions*, N.Y. Times (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/health/fda-fentanyl-opioid-epidemic-overdose-cancer.html; Letter from Hon. Edward Markey, U.S. Senator, to Hon. Scott Gottlieb, Commissioner, FDA (Aug. 17, 2018), https://www.markey.senate.gov/imo/media/doc/FDA%20REMS%20and%20fentanyl%2008.17.18.pdf.

efficacy of the TIRF REMS based on the produced documents.[15] And the FDA subsequently promised changes "intended to strengthen the current TIRF REMS."[16]

A manufacturer surely would not publicly disclose that a REMS was not being followed. Therefore, under FMI's broad reading, the FDA could withhold this important safety information from FOIA requesters.

Risks Posed by Drugs and Medical Devices. Each year, the FDA receives several hundred thousand reports of suspected deaths and serious injuries associated with drugs and medical devices. As part of FDA regulation of drugs and medical devices, the agency requires companies that market drugs and medical devices to submit reports concerning such "adverse events" or "adverse effects" associated with a drug or medical device throughout the product's life cycle. *See* 21 C.F.R. § 312.32 (drug investigational process adverse event reporting); § 314.80 (drug post-market adverse event reporting); § 803.10 (medical device post-market adverse event reporting); § 812.50 (medical device investigational process adverse effect reporting).

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[15] G. Caleb Alexander, Testimony for the Record Submitted to the U.S. Food and Drug Administration for the Joint Meeting of the Drug Safety and Risk Management Advisory Committee and the Anesthetic and Analgesic Drug Products Advisory Committee, Dkt. No. FDA-2018-N-1917 (Aug. 3, 2018), https://int.nyt.com/data/documenthelper/123-fda-opioid-overdose-cancer/4be5694a2729eb5b522d/optimized/full.pdf.

[16] FDA, *Statement from FDA Commissioner Scott Gottlieb, M.D. on the Agency's 2019 Policy and Regulatory Agenda for Continued Action to Forcefully Address the Tragic Epidemic of Opioid Abuse* (Feb. 26, 2019), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm632067.htm.

The FDA has routinely made adverse event information available to the public, recognizing that it is not exempt under exemption 4.[17] The FDA proactively discloses the information, posting online a database containing post-market "adverse event reports, medication event reports and product quality complaints resulting in adverse events that [have been] submitted to FDA."[18] In addition, "[i]ndividual case safety reports from the FAERS database can also be obtained by sending a [FOIA] request to FDA."[19] *See also Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1329 (9th Cir. 1995) (noting that the FDA agrees that "individual adverse reaction reports are not exempt from disclosure" under FOIA).

Although the FDA maintains a similar public-facing database for medical device malfunctions—Manufacturer and User Facility Device Experience (MAUDE)[20]—recent investigative reporting uncovered that the FDA has maintained a "hidden database" containing reports concerning over a million incidents involving medical device malfunctions.[21] The FDA has begun requiring "place-

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[17] *See* FDA, *Electronic Reading Room* (last updated Mar. 6, 2017), https://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/default.htm.

[18] FDA, *Questions and Answers on FDA's Adverse Event Reporting System (FAERS)* (last updated June 4, 2018), https://www.fda.gov/drugs/guidancecomplianceregulatoryinformation/surveillance/adversedrugeffects/default.htm.

[19] *Id.*

[20] *See* FDA, *MAUDE – Manufacturer and User Facility Device Experience* (last updated Feb. 28, 2019), https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfmaude/search.cfm.

[21] Christina Jewett, *Hidden FDA Reports Detail Harm Caused by Scores of Medical Devices*, Kaiser Health News (Mar. 7, 2019),

holder" public reports to be filed in at least some instances, so that members of the public "may find a [placeholder] public report and submit a [FOIA] request to get information about incidents."[22] Although access to these previously hidden adverse event reports involving devices is more cumbersome than access through the MAUDE database, FOIA continues to provide the public with a vital means to obtain access.

Amicus Public Citizen regularly uses adverse event data, along with other information, to monitor the FDA's regulation of drugs and medical devices on the market. In many instances, Public Citizen has used information obtained in this way to submit comments to FDA dockets or to petition the FDA to remove dangerous drugs from the market.[23] Adverse event report information has contributed to Public Citizen citizen petitions that helped to prompt removal of 23 dangerous drugs from the market.[24]

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https://khn.org/news/hidden-fda-database-medical-device-injuries-malfunctions/.

[22] *Id.*

[23] *See, e.g.*, Public Citizen, Petition to Ban Sibutramine (Meridia) (FDA Dec. 3, 2009), https://www.citizen.org/our-work/health-and-safety/petition-ban-sibutramine-meridia; Public Citizen, Petition to Ban the Antibiotic Gatifloxacin (Tequin) (FDA May 1, 2006), https://www.citizen.org/our-work/health-and-safety/articles/petition-ban-antibiotic-gatifloxacin-tequin; Public Citizen, Petition to Withdraw Celecoxib & Valdecoxib (FDA Jan. 24, 2005), https://www.citizen.org/our-work/health-and-safety/petition-withdraw-celecoxib-valdecoxib.

[24] *See, e.g.*, FDA, *FDA Drug Safety Communication: FDA Recommends Against the Continued Use of Meridia (sibutramine)* (Oct. 8, 2010), https://www.fda.gov/Drugs/DrugSafety/ucm228746.htm; Determination that TEQUIN (Gatifloxacin) Was Withdrawn from Sale for Reasons of Safety or Effectiveness, 73 Fed. Reg. 52,357 (Sept. 9, 2008); FDA, *COX-2 Selective (Includes Bextra, Celebrex, and Vioxx)*

There can be little doubt that medical device and pharmaceutical companies typically keep private and do not publicly disclose the adverse event information that they submit to the FDA. Thus, under FMI's view, reports concerning both drugs and devices would fall within exemption 4. All FDA databases of adverse events would effectively be "hidden databases," and the public would have no avenue to uncover their contents. The lack of public access to this information would severely undermine the public's ability to monitor the adequacy and effectiveness of the FDA's regulation of drugs and medical devices, and thus to advocate for stronger protections against dangerous products.

Contamination in Drug Manufacturing Facilities. Under 21 U.S.C. § 374, the FDA is authorized to perform inspections of pharmaceutical facilities and search for, among other things, toxic hazards such as mold and bacteria. Inspection findings are documented on FDA Form 483, which is "issued to firm management at the conclusion of an inspection when an investigator(s) has observed any conditions that in their judgment may constitute violations of" the Food Drug and Cosmetic Act.[25]

In 2018, several FOIA requests were submitted for a Form 483 relating to an FDA inspection of Pfizer's Hospira manufacturing facility in McPherson, Kansas. The FDA subsequently published this Form 483 online in its

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and Non-Selective Steroidal Anti-Inflammatory Drugs (NSAIDs) (Apr. 7, 2005), https://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm429364.htm.

[25] FDA, *FDA Form 483 Frequently Asked Questions* (last updated July 24, 2017), https://www.fda.gov/ICECI/Inspections/ucm256377.htm.

FOIA Electronic Reading Room.[26] The Hospira Form 483 revealed that, despite numerous warnings from the FDA, including a 2017 warning letter, Pfizer had failed to address ongoing manufacturing violations at the Hospira facility.[27]

Specifically, Pfizer "failed to adequately investigate 9 previous events when an unknown foreign material/gel was observed adhering to the ... filter screens [in the manufacturing facility]" even though it knew about potential contamination in its manufacturing lines.[28] Furthermore, despite identifying a "critical defect" in its manufacturing process as early as December 20, 2017, Pfizer did not modify its written procedures to address the defect until March 30, 2018, and did not implement the change until April 30, 2018.[29] The inspection report shed new light on previously reported failings in the plant's manufacturing process, such as the fact that Pfizer had to partially suspend production at the plant after finding mold contamination.[30] The report noted numerous times that Pfizer

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[26] *See* FDA, Form 483 Issued to Hospira Inc. A Pfizer Company (Aug. 8, 2018), https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm627630.pdf ("Hospira Form 483"); *see also* 5 U.S.C. § 552(a)(2)(D) (requiring agencies to publicly post in an electronic format records that have been released to any person and that either "because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records" or "have been requested 3 or more times").

[27] Letter from Cheryl A. Bigham, District Director, Kansas City District, FDA Office of Regulatory Affairs, to Ian C. Reed, Chairman and CEO, Pfizer Inc. (Feb. 14, 2017), https://www.fda.gov/iceci/enforcementactions/warningletters/2017/ucm542587.htm.

[28] Hospira Form 483 at 2.

[29] *Id.* at 3.

[30] *Id.* at 1.

failed to alert the FDA when it discovered issues with its plant, failed to implement an adequate aseptic process, and failed to institute adequate inspection procedures.[31] The report also catalogued other violations of the FDA's Current Good Manufacturing Practices.[32] The release of the form resulted in extensive media coverage, forcing Pfizer to publicly confront the issues and make changes to address them—and showing that the FDA apparently had not done so.[33]

Since at least 2009, the FDA has proactively disclosed certain information from various types of inspections, including inspections of drug manufacturing facilities, in recognition of the information's usefulness in "improv[ing] the public's understanding of how the FDA works to protect the public health, provid[ing] the public with a rationale for the Agency's enforcement actions, and

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[31] *Id.* at 3, 4–6, 6–8.

[32] *Id.* at 9–10.

[33] *See, e.g.*, Eric Palmer, *Pfizer CEO: It'll Be 2020 Before Issues in Sterile Injectables Manufacturing Are Resolved*, FiercePharma (Jan. 30, 2019), https://www.fiercepharma.com/manufacturing/pfizer-ceo-indicates-it-will-be-2020-before-sterile-injectables-issues-are-resolve; Dan Stanton, *Pfizer Kansas Plant Hit By FDA 483 With 8 Repeat Observations*, BioProcess International (Dec. 10, 2018), https://bioprocessintl.com/bioprocess-insider/regulations/pfizer-kansas-plant-hit-by-fda-483-with-8-repeat-observations/; Ana Mulero, *Updated: FDA Flags Pfizer's Hospira Plant in Kansas Over Repeat 483 Citations*, Regulatory Focus (Dec. 7, 2018), https://www.raps.org/news-and-articles/news-articles/2018/12/fda-flags-pfizers-hospira-plant-in-kansas-over-re; Ben Hargreaves, *Pfizer lowers guidance due to Hospira Manufacturing Issues*, in-Pharma Technologist.com (Nov. 1, 2018), https://www.in-pharmatechnologist.com/Article/2018/11/01/Pfizer-lowers-guidance-due-to-Hospira-manufacturing-issues.

... inform[ing] the public and industry decision-making allowing them to make more informed marketplace choices and help to encourage compliance."[34] Even a quick review of the FDA Office of Regulatory Affairs' FOIA Electronic Reading Room reveals over one thousand Form 483s available for public viewing.[35]

Although Form 483s themselves are government documents, a significant portion of the information in Form 483s is "obtained from" the regulated companies and thus potentially within the reach of exemption 4.[36] Under FMI's reading, a great deal of the information on the forms would fall within the exemption. Pfizer, for example, undoubtedly would not publicly disclose information about its previous actions and findings at the Hospira facility, putting such information beyond the reach of FOIA under FMI's proposed definition.

Post-Marketing Studies of Drug Risks. When the FDA approves a new drug, it sometimes requires as a condition of approval that the drug manufacturer undertake a post-approval study, also referred to as a Phase IV Trial. These studies "are conducted after a treatment is ap-

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[34] FDA, *Inspection Citation* (last updated Feb. 13, 2019), https://www.fda.gov/ICECI/Inspections/ucm346077.htm.

[35] FDA, *ORA FOIA Electronic Reading Room* (last updated May 22, 2018), https://www.fda.gov/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/ORA/ORAElectronicReadingRoom/default.htm ("We are making these records publicly available either (1) proactively at our discretion or (2) because they are 'frequently requested' per the Electronic Freedom of Information Act Amendments of 1996.").

[36] Several of the currently available Form 483s have some information withheld under exemption 4. *See, e.g.*, Hospira Form 483.

proved for use by the FDA [and] provide additional information including the treatment or drug's risks, benefits, and best use."[37]

When the FDA approved the drug metformin, it required a post-marketing study because of concerns about serious adverse effects. *Public Citizen Health Research Grp. v. FDA*, 964 F. Supp. 413, 414 (D.D.C. 1997). When amicus Public Citizen submitted a FOIA request for the post-marketing study protocol, the FDA asserted exemption 4. *Id.* Public Citizen filed suit, and the court, applying the *National Parks* standard, concluded that the manufacturer, which had intervened in the litigation to argue against disclosure, had not shown a likelihood that disclosure would cause competitive harm. *Id.* at 415–16. The court explained that it "found little to suggest that the details of the protocol, i.e., the parameters of the study, would reveal anything that would provide an advantage to a competitor." *Id.* at 416. The court subsequently ordered disclosure of the protocol. *See Public Citizen Health Research Grp. v. FDA*, No. 96-cv-1650 (JR) (D.D.C. Nov. 3, 1997), ECF No. 45.

Following this ruling, Public Citizen has requested through FOIA—and received—post-marketing study protocols for several additional drugs. In the immediate aftermath of the metformin decision, the FDA in response to FOIA requests continued to rely on exemption 4 to withhold protocols and released them only following the initiation of litigation; thereafter, FDA began releasing such protocols in response to FOIA requests. Public Citizen has used such protocols to evaluate the FDA's ap-

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[37] FDA, *What Are the Different Types of Clinical Research?* (last updated Jan. 4, 2018), https://www.fda.gov/forpatients/clinicaltrials/types/default.htm.

proval decisions and to assess the agency's use of post-marketing studies of drugs approved in the face of unresolved safety concerns. Under FMI's broad construction of exemption 4, this information would no longer be available to the public.

Uses of Drugs Disapproved by the FDA. When drug manufacturers submit new drug applications to the FDA for approval to market a drug, they must include "the drug product's proposed indications for use." 21 C.F.R. § 314.50(a)(1); *see also id.* § 314.50(d)(5)(ii) (requiring inclusion of "[a] description and analysis of each controlled clinical study pertinent to a proposed use of the drug"). The FDA may grant approval for none, all, or some of the proposed uses of the drug.

In the case of valdecoxib (Bextra), the FDA approved the drug for three uses but rejected its use for acute pain. Although the FDA publicly posted records related to the agency's approval for the three approved uses, it redacted and withheld records related to the disapproved use for acute pain pursuant to exemption 4 as confidential commercial information. In the meantime, an article appeared in the Journal of the American Dental Association touting Bextra's use for acute pain.[38] The article failed to mention that the FDA had *not* approved Bextra for this use. But because the FDA had redacted from its public disclosure all material related to Bextra's use for acute pain, the public did not have information to balance the article's assertions about the drug's use for acute pain.

Public Citizen submitted a FOIA request for unredacted versions of the records related to FDA's approval

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[38] Stephen E. Daniels et al., *The Analgesic Efficacy of Valdecoxib vs. Oxycodone/Acetaminophen After Oral Surgery*, 133 J. Am. Dental Ass'n 611 (2002).

of Bextra, including materials related to Bextra's disapproved use for acute pain. After the FDA failed to respond to Public Citizen's FOIA request, Public Citizen filed suit against the FDA.[39] In litigation, the FDA initially relied on exemption 4 but later released some of the previously redacted material. The material indicated that the drug was associated with a potentially deadly side effect: an increased risk of thromboembolic events—blood clots—in certain patients using Bextra for acute pain. Public Citizen relied on this information in a citizen petition asking the FDA to withdraw approval of the drug,[40] and the FDA later did remove it from the market.[41]

Safety Violations at Food Processing Facilities. Under the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq., the U.S. Department of Agriculture (USDA) has the authority to inspect slaughterhouses and other meat processing facilities to ensure the safety of meat products sold to the public. In 2009, *New York Times* reporter Michael Moss revealed inadequate testing of meat in 2007 that resulted in an *E. coli* outbreak that sickened 940 people.[42] Cargill eventually recalled 844,812 pounds of beef patties following the outbreak.[43] Using FOIA requests,

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[39] *See Public Citizen Health Research Grp. v. FDA*, Complaint, No. 04-cv-304 (D.D.C. Feb. 26, 2004), https://www.citizen.org/system/files/case_documents/acf5cf.pdf.

[40] *See* Public Citizen, Petition to Withdraw Celecoxib & Valdecoxib, *supra* n.23.

[41] FDA, *COX-2 Selective (Includes Bextra, Celebrex, and Vioxx) and Non-Selective Steroidal Anti-Inflammatory Drugs (NSAIDs)*, *supra* n.24.

[42] Michael Moss, *The Burger That Shattered Her Life*, N.Y. Times (Oct. 3, 2009), https://www.nytimes.com/2009/10/04/health/04meat.html.

[43] *Id.*

Moss was able to obtain details from the USDA about Cargill's failure to follow its safety plan.[44] USDA records acquired through FOIA also revealed that in the months before the outbreak, federal inspectors found that Cargill was in violation of safety procedures for handling ground beef.[45] The USDA did not impose any fines or sanctions.[46] In the aftermath of the outbreak, USDA officials promised to "creat[e] a new system to collect and analyze these types of violations" in order to better protect against foodborne illnesses.[47]

Although the USDA withheld some information in response to Moss's FOIA request, it disclosed important information, including that Cargill had not followed its safety plan and had been found to be in violation of safety procedures in the months leading up to the outbreak.[48] Broadening the scope of exemption 4 would limit the public's ability to obtain information about food processing inspections, and thus limit the ability of the public, watchdog groups, and journalists to access vital information about public health and USDA's work to protect it.

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[44] USDA, FSIS Notice of Intended Enforcement (Dec. 14, 2007), https://www.nytimes.com/interactive/projects/documents/food-safety-documents (pp. 2–9).

[45] *See* USDA, FSIS Noncompliance Record No. 007-2007-5950 (July 3, 2007), https://www.nytimes.com/interactive/projects/documents/food-safety-documents (p. 104); USDA, FSIS Noncompliance Record No. 0007-2007-5950 (Aug. 7, 2007), https://www.nytimes.com/interactive/projects/documents/food-safety-documents (pp. 105–06).

[46] Moss, *supra* n.42.

[47] *Id.*

[48] *See* documents cited *supra* at nn.44 & 45. Although Moss also obtained unredacted versions of certain records from a source, Moss, *supra* n.42, this information could be gleaned from the redacted records produced by USDA.

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As these examples demonstrate, disclosure through FOIA of information submitted to the government by commercial entities plays an important role in "hold[ing] the governors accountable to the governed" on issues of public health and safety. *Robbins Tire & Rubber Co.*, 437 U.S. at 242. The Court should reject FMI's proposed broadening of the scope of exemption 4, which would cut off access to vital information, undermining FOIA's objective and diminishing protection for public health and safety.

III. The longstanding construction of exemption 4 is sensible, workable, and reflects the balance Congress struck in creating FOIA exemptions.

Although FMI contends that the *National Parks* competitive harm standard is "unworkable," Pet. Br. 41–43; *see* U.S. Br. 23–24, *National Parks* has been widely adopted by courts across the country, *see* Pet. Br. 38 & nn.23 & 24. Despite FMI's protestations, there is scant evidence in the case law that courts struggle to apply the standard.

As the government acknowledges, the *National Parks* standard has been applied by all federal agencies since at least 1987. *See* U.S. Br. 23. Procedures incorporated into federal agencies' FOIA regulations generally require that an agency "notify[] submitters of a possible disclosure of their information and instruct agencies to consider the grounds that submitters identify for non-disclosure." *Id.* at 23 (quoting Exec. Order 12,600, 3 C.F.R. 235–36 (1987)); *see, e.g.*, 7 C.F.R. § 1.12(a) (USDA); 21 C.F.R. § 20.61(e)(1)–(3) (FDA); 49 C.F.R. § 7.29(a)–(b) (Department of Transportation). Agencies must further "give the submitter a written statement briefly explaining why the submitter's objections are not sustained" and "promptly

notif[y]" the submitter "[w]henever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information." Exec. Order 12,600, 3 C.F.R. 237; *see, e.g.*, 7 C.F.R. § 1.12(d)–(e); 21 C.F.R. § 20.61(e)(3)–(4); 49 C.F.R. § 7.29(b), (e). Thus, before any disclosure, the agency notifies the submitter that it has received a FOIA request, receives the submitter's input, and gives the submitter notice of its decision so that the submitter can seek judicial review if it disagrees. This approach has operated for decades, and the limited number of reverse-FOIA suits speaks to the workability of the system. *See supra* n.4.

FMI's primary complaint about the *National Parks* standard appears to be that "lower courts have 'tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines.'" Pet. Br. 42 (quoting U.S. Dep't of Justice Guide to the Freedom of Information Act at 309 (2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf). But that a standard—like the standard for assessing an unwarranted invasion of privacy under exemption 6—requires a fact-specific application does not render it "unworkable." Notably, neither FMI nor the government offers evidence that application of the standard has caused competitive harm to submitters.[49]

Thus, as respondent Argus News Leader has explained, the claimed circuit splits on which FMI relies as

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[49] FMI asserts that exemption 4 procedures "sometimes yield the wrong result," but does not explain what it means by that statement and does not offer examples of FOIA disclosures that caused harm, other than the "harm" of spending resources on the FOIA process. Pet. Br. 42–43 & n.28. In any event, FMI's disagreement with unspecified court decisions does not suggest that the standard applied in those decisions is "unworkable."

"proof of *un*workability," Pet. Br. 41, show no more than "courts applying the same test to different facts, resulting in different outcomes." Resp. Br. in Opp. 23. These cases reflect the "balance" struck by Congress in enacting FOIA's "broad provisions favoring disclosure, coupled with the specific exemptions." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989). Congress could have exempted all information submitted by non-governmental entities or none of it, but Congress instead chose to limit exemption 4 to "trade secrets" and "commercial or financial information" that is "privileged or confidential." 5 U.S.C. § 552(b)(4). That the *National Parks* test strikes a "balance" between disclosure and withholding is evidenced by the fact that the case law contains both numerous decisions ordering disclosure and numerous decisions denying it. *See, e.g.*, *Public Citizen v. U.S. Dep't of Health & Human Servs.*, 66 F. Supp. 3d 196 (D.D.C. 2014); *Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898 (D.C. Cir. 1999).

In contrast, under FMI's proposed standard, requesters would be unlikely ever to prevail in challenging withholding based on exemption 4. And, as explained in Part II, the harm to the public from the dramatically decreased accessibility would be immense.

CONCLUSION

For the foregoing reasons, and the reasons stated in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Inter American Press Association, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, Media Law Resource Center, MPA – The Association of Magazine Media, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, National Public Radio, Inc., New England First Amendment Coalition, The New York Times Company, News Media Alliance, The NewsGuild - CWA, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, Reporters Without Borders, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, South Dakota Newspaper Association, TEGNA Inc., and Tully Center for Free Speech (collectively, "*amici*").

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amici curiae*, its members, or its counsel made monetary contributions intended to fund the preparation or submission of this brief. Both parties have given blanket consent to the filing of all *amicus* briefs.

Amici file this brief in support of Respondent Argus Leader Media ("Argus Leader"). *Amici* rely on the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, to gather information and inform the public about government activities. FOIA is an important tool frequently used by the press in carrying out its role "as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). As this Court has recognized, the Act is a "structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

This case marks the first time the Court has granted certiorari to interpret FOIA since the enactment of the FOIA Improvement Act of 2016. FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538 (2016). The 2016 amendments to the Act impose new, additional requirements that must be met before records may be withheld under one of FOIA's discretionary exemptions, which include Exemption 4. Specifically, the amendments impose a "foreseeable harm" requirement, prohibiting a government agency from withholding information unless it "reasonably foresees that disclosure would harm an interest protected by" that exemption. 5 U.S.C. § 552(a)(8). While the FOIA request at issue in this case is not governed by the foreseeable harm standard because it was made before the effective date of the 2016 amendments, *see* Pub. L. No. 114–185, 130 Stat. 544–45 (2016), future FOIA requests like it will be. Thus, regardless of whether this Court affirms or

rejects the interpretation of Exemption 4 articulated by the Eighth Circuit below, for all FOIA requests submitted since June 30, 2016, the responding government agency will be required to show harm that is reasonably foreseeable to withhold records under Exemption 4. *Id.* Accordingly, *amici* write not only to urge the Court to interpret Exemption 4 in this case in a manner that is consistent with the Act's purpose and congressional intent, but also to ensure the Court is aware of the plain text of the Act—including its foreseeable harm requirement—as it stands today.

SUMMARY OF ARGUMENT

Petitioner argues that the plain text of Exemption 4, 5 U.S.C. § 552(b)(4), permits government agencies to withhold records requested under FOIA if a third party claims that the information is either kept private, or, alternatively, that disclosure might lead to "negative publicity" or "could" result in some financial harm. Pet. Br. 16, 53. Petitioner's purported textual argument, however, is irreconcilable with recent amendments to FOIA that impose a "foreseeable harm" requirement that must be satisfied before agency records can be withheld. *See* FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538, 539 (2016).

Because Congress's 2016 amendments to FOIA significantly alter the statute, but do not apply to the request at issue in this case, this Court should dismiss the writ of certiorari as improvidently granted. Alternatively, *amici* urge the Court to affirm the decision of the United States Court of Appeals for the Eighth Circuit, and adopt the test set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The recent amendments to FOIA impose a "foreseeable harm" requirement for all discretionary withholdings, including those under Exemption 4, to prevent agencies from unnecessarily withholding records from the public. *See* S. Rep. No. 114–4, at 2–3 (2015). Under this requirement, a record that falls within the scope of one of FOIA's enumerated, discretionary exemptions cannot be withheld unless the agency also "reasonably foresees that disclosure would harm an interest protected by [that]

exemption." 5 U.S.C. § 552(a)(8)(A); *see also* FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538, 539 (2016). Thus, even if Petitioner was correct with respect to its interpretation of an isolated word within Exemption 4 as applied to the particular request at issue in this case—which it is not—that interpretation cannot survive under the plain language of the Act as amended; FOIA now expressly requires a government agency to show that it reasonably foresees harm from disclosure in order to justify withholding records, including those the agency claims contain "confidential" information under Exemption 4. *Cf.* Pet. Br. 2 (incorrectly suggesting that the foreseeable harm standard, 5 U.S.C. § 552(a)(8)(A), governs the FOIA request in this case); Cert. Pet. Br. 2 (same).

In the context of Exemption 4, the foreseeable harm standard requires agencies to release records unless (1) the record meets the threshold requirements of the exemption, and (2) the agency demonstrates that it reasonably foresees that disclosure of the records will harm an interest protected by Exemption 4—*i.e.*, the competitive position of a third party. Thus, the fact that information in a record meets the threshold requirements of Exemption 4, alone, does not mean that it may be withheld. Nor is mere speculation that there may be some indirect harm in the future sufficient to justify withholding. Congress expressly rejected both of these propositions when it codified the foreseeable harm standard. *See* S. Rep. No. 114–4, at 8 (noting that "mere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information").

This Court's precedent states that the Court exercises its "powers of judicial review only as a matter of necessity." *Sanks v. Georgia*, 401 U.S. 144, 151 (1971) (dismissing in light of new legislation addressing the issue presented). There is no question that the Court's holding in this case would be limited to FOIA requests submitted before Congress's enactment of the foreseeable harm requirement. Accordingly, *amici* join Respondent in urging that the writ of certiorari in this case be dismissed as improvidently granted. Resp. Br. 14.

Alternatively, *amici* urge the Court to affirm the decision of the United States Court of Appeals for the Eighth Circuit, which adopted and applied the test articulated by the United States Court of Appeals for the District of Columbia Circuit in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The plain text of FOIA's foreseeable harm standard substantially mirrors the *National Parks* test. Both require the government to show that harm will result to the competitive position of a third party before it may withhold records under Exemption 4. Just as the *National Parks* test requires agencies to show how disclosure of documents will result in competitive harm, the foreseeable harm standard requires agencies to show how disclosure will result in harm to an interest protected by an exemption—in the context of Exemption 4, the competitive position of the third party. *Cf.* Pet. Br. 46.

The strong public interest in access to records regarding expenditures of public funds also counsels in favor of affirming the Eighth Circuit's decision. FOIA is a powerful tool used by journalists, news

organizations, and the public to monitor how the government spends tax dollars. For example, journalists have used SNAP data to determine which private companies obtain the greatest benefits from government subsidies. Similar records also allow the public to understand which companies the government selects for lucrative contracts. The *National Parks* test ensures that the public can access agency records to learn the details of how government programs use public dollars.

For the reasons set forth herein, *amici* agree with Respondent that the writ of certiorari in this case should be dismissed as improvidently granted, Resp. Br. 14, or, alternatively, that the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

ARGUMENT

I. FOIA's plain text, as amended, requires agencies to disclose records otherwise covered by a discretionary exemption, unless it reasonably foresees that disclosure will cause harm particularly protected by an exemption.

The Freedom of Information Act ("FOIA" or the "Act") makes government records presumptively open to the public in order to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (citing S. Rep. No. 813, at 3 (1965)).

Congress has amended FOIA on a number of occasions to improve its effectiveness, often narrowing exemptions or providing procedural support for requesters. *See, e.g.*, H. Rep. No. 110–45, at 4–5 (2007) (noting the OPEN Government Act of 2007 was aimed at addressing problems in FOIA administration); S. Rep. No. 104–272, at 5 (1996) (explaining the 1996 amendments to FOIA sought to "encourage electronic access" to government records and create more efficient and timely government responses); H. Rep. No. 94–1441, at 24–25 (1976) (Conf. Rep.) (explaining that the 1976 Government in the Sunshine Act amended FOIA Exemption 3 by creating particular criteria for an agency to withhold records); S. Rep. No. 93–854, at 182 (1974) (explaining

the 1974 amendments to FOIA require courts to conduct *de novo* review of executive claims of national security).

Congress's most recent amendments to FOIA, through the FOIA Improvement Act of 2016, limit the circumstances in which the government can withhold records from the public by requiring agencies to provide records unless disclosure is prohibited by law or the agency reasonably foresees that disclosure would harm an interest protected by an exemption. *See* S. 337, 114th Cong. (2015–2016). The full text of FOIA's foreseeable harm standard reads:

> An agency shall—
>
> (i) withhold information under this section only if—
> (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
> (II) disclosure is prohibited by law;

5 U.S.C. § 552(a)(8)(A).

In the Senate Report accompanying the bill, Congress explained that it was amending FOIA to address its concern about the "growing trend" of agencies overusing FOIA exemptions to withhold records from the public. *See* S. Rep. No. 114–4, at 2–3 (2015). As the Senate Report states, the foreseeable harm standard was intended to prohibit the government's use of "discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure." *Id.* at 3. It further requires agencies applying the

foreseeable standard to determine whether disclosing a "particular document, given its age, content, and character, *would* harm an interest protected by the applicable exemption," and that it may withhold the document *only* after establishing this likelihood of concrete harm. *Id.* (emphasis added). The Senate Report makes clear that "mere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information." *Id.* at 8 (citation omitted).

The concerns expressed in the Senate Report mirror those identified in a 2016 report by the former chairman of the House Committee on Oversight and Government Reform, Jason Chaffetz, which highlighted agencies' overuse and misapplication of FOIA exemptions, including Exemption 4. Staff of H. Comm. on Oversight and Gov't Reform, 114th Cong., FOIA is Broken: A Report iii–iv, 20 (2016). Titling the report "FOIA is Broken," then-Chairman Chaffetz called for structural reform to enable FOIA to facilitate government transparency, as intended, noting a comment from a 26-year-old freelance journalist, who said: "I often describe the handling of my FOIA request as the single most disillusioning experience of my life." *Id.* at ii, 39. The report explained that reform was necessary to prevent agencies from broadly invoking exemptions when harm will not occur, specifically pointing to Exemption 4. *See id.* at 20.

Since the passage of the FOIA Improvement Act of 2016, courts have followed Congress's intent by applying the foreseeable harm standard as a distinct requirement that an agency must meet, in addition to showing that a record falls within the scope of a

discretionary FOIA exemption. In *Rosenberg v. United States Department of Defense*, for example, the United States District Court for the District of Columbia explicitly rejected the argument of the Department of Defense ("DoD") that the foreseeable harm standard merely duplicates existing agency obligations under FOIA. 342 F. Supp. 3d 62, 78 (D.D.C. 2018). The district court held that the DoD did not meet the foreseeable harm requirement when it claimed that disclosing any records "would jeopardize the free exchange of information between senior leaders within and outside of the [DoD]," without any showing that disclosure would harm the deliberative process, as protected by Exemption 5.[2] *Id.*; *see also Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, 2017 WL 5972702 (N.D. Cal. 2017) (holding that a government agency failed to satisfy the foreseeable harm standard when it withheld documents without explaining why the release of each specific document would harm the deliberative process).

In sum, with the addition of the foreseeable harm requirement to FOIA, any agency that seeks to withhold records under a discretionary exemption must establish *both* that a specific, discretionary FOIA exemption applies and that the agency reasonably foresees that the interest protected by that exemption will be harmed by disclosure.

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[2] FOIA's Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5).

II. Petitioner's arguments are incompatible with the foreseeable harm standard.

Petitioner argues that this Court's sole consideration in interpreting Exemption 4 should be whether the submitter keeps the information private, Pet. Br. 16, or, in the alternative, that Exemption 4 permits a "*broad* inquiry assessing whether there is a *reasonable possibility* that commercial or financial interests *may* be injured, directly or indirectly." *Id.* at 47 (emphasis added). Both interpretations of Exemption 4 are incompatible with the plain text of the Act as it exists today, and consequently the writ of certiorari should be dismissed as improvidently granted.

First, even assuming, *arguendo*, that Petitioner's arguments pass muster under the language of the Act prior to its amendment in 2016, under current law, FOIA cannot be interpreted to allow for the blanket withholding under Exemption 4 of any record that is kept private. *See* Pet. Br. 16. The foreseeable harm standard prohibits withholding of records unless disclosure will harm the protected interest—in this case, a third party's competitive standing. 5 U.S.C. § 552(a)(8)(A); *see also* Resp. Br. 24–36 (explaining that the common law requires a showing of likelihood of competitive harm in determining what is "confidential").[3] The mere fact

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[3] Petitioner's argument that records should be exempt from disclosure if they are kept private—regardless of any competitive harm—misses the point of FOIA. *Most* government records are kept "private" until they are disclosed under FOIA. Congress enacted FOIA because the government was consistently denying the public access to government records "for

that information may have been kept private does not demonstrate that competitive harm will result from its release. Thus, Petitioner's interpretation of the word "confidential" in Exemption 4, even if adopted by this Court, will not govern FOIA requests submitted since the effective date of the FOIA Improvement Act of 2016.

Should its interpretation of "confidential" fail, Petitioner suggests another atextual reading of Exemption 4. Petitioner argues that Exemption 4 contemplates "a *broad inquiry* assessing whether there is *a reasonable possibility* that commercial or financial interests *may be* injured, *directly or indirectly*." Pet. Br. 47 (emphasis added). Again, the plain language of the foreseeable harm standard makes clear that *potential* harms will not suffice: nondisclosure is permissible only when the agency "reasonably foresees that disclosure *would* harm" a protected interest. 5 U.S.C. § 552(a)(8)(A). It does not allow for records to be withheld because it is possible some harm to an interest "may" occur in the future. *See id.*

At trial, Petitioner's witnesses asserted ways that "competitors *could* use the SNAP data," and testified about their fears of how the data could be used, and the stigma that might be caused if the data were released. Pet. Br. 51–52 (emphasis added). Such speculative claims of possible harm, however, do not

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good cause," with no further explanation. *See* S. Rep. No. 1219, at 8 (1964). And its most recent amendments to the Act sought to prohibit agencies from withholding records *even if* a particular exemption applies. S. Rep. No. 114–4, at 3.

satisfy the Act's requirement that records may be withheld only if it is reasonably foreseeable that disclosure *would harm* a third party's financial interests. And as testimony submitted by the Argus Leader made clear, any competitive harm was "very limited and very unlikely," and that any risk of harm was low. *Id.* at 53 (citing Reporter's Record II:238; *id.* at II:351; *id.* at II:362).

An evaluation of harm is not "unworkable" as Petitioner claims. Pet. Br. 40. Evaluating these claims of harm on a case-by-case basis is in fact *precisely* what Congress intended when it codified the foreseeable harm requirement. As the Senate Report accompanying the FOIA Improvement Act makes clear, "the content of a *particular* record should be reviewed and a determination made as to whether the agency reasonable foresees that disclosing that *particular* document, *given its age, content, and character*, would harm an interest protected by the applicable exemption." S. Rep. No. 114–4, at 8 (emphasis added). Indeed, allowing Petitioner's hypothetical claims of harm to satisfy the foreseeable harm requirement would "swallow FOIA nearly whole." *Argus Leader Media v. U.S. Dep't of Agriculture*, 889 F.3d 914, 916 n.4 (8th Cir. 2018).

For these reasons, dismissal of the writ of certiorari as improvidently granted is appropriate. This Court exercises its "powers of judicial review only as a matter of necessity." *Sanks v. Georgia*, 401 U.S. 144, 151 (1971) (dismissing in light of new legislation addressing the issue presented); *see also Cook v. Hudson*, 429 U.S. 165, 165 (1976) (dismissing writ of certiorari as improvidently granted in light of changes in applicable law). As noted by Respondent, the

United States Department of Agriculture has represented that it will *not* withhold the records at issue in this case based on Exemption 4's confidentiality protections, even if this Court reverses the Eighth Circuit's judgment mandating disclosure. *See* Resp. Br. 1–3, 15; U.S. Br. 32, 35. And, contrary to Petitioner's assertion, there is no question that this Court's holding would be limited to FOIA requests submitted before Congress's enactment of the foreseeable harm requirement. *See* Resp. Br. 3; Pub. L. No. 114–185, 130 Stat. 544–45 (2016); *cf.* Pet. Br. 2 (incorrectly asserting that the foreseeable harm standard, 5 U.S.C. § 552(a)(8), governs the FOIA request in this case, which was submitted in 2011); Cert. Pet. Br. 2 (same). Because the Argus Leader, or any other requester, could file a FOIA request for the same Supplemental Nutrition Assistance Program ("SNAP") data today and have it governed by the foreseeable harm standard, this case is neither an efficient nor effective use of this Court's resources.

III. The *National Parks* test comports with congressional intent and FOIA's foreseeable harm requirement.

Should this Court interpret Exemption 4 in this case, it should affirm, and adopt the standard set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test not only correctly identifies and addresses the purpose of Exemption 4, but it is also consistent with the foreseeable harm requirement applicable to all FOIA requests submitted after June 30, 2016, the effective date of the FOIA Improvement Act. Pub. L. No. 114–185, 130 Stat. 538 (2016).

A. *National Parks* correctly identifies the primary interest protected by Exemption 4—the potential harm to competitive interests of third parties.

Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Federal appellate courts, beginning with the United States Court of Appeals for the District of Columbia Circuit in *National Parks*, have identified the primary purpose of Exemption 4 as "protect[ing] persons who submit financial or commercial data to government agencies from the *competitive disadvantages* which would result from its publication." 498 F.2d at 768 (emphasis added);[4] *see also* Resp. Br. 24 n.10 (listing cases from circuits adopting *National Parks*). In doing so, the *National Parks* court looked to the Senate Report accompanying FOIA's initial enactment, which detailed numerous examples of documents that would likely be exempt from disclosure, and legislative statements from government officials and members of the public who explained why such an exemption for financial or commercial records was necessary. 498 F.2d at 768–70. Each statement focused on protecting businesses from the "unfair advantage" that its

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[4] *National Parks* also discusses the government's interest in obtaining data from third parties as another interest protected by Exemption 4. *National Parks*, 498 F.2d at 767–68. This interest is not at issue in this case. Petitioner did not and cannot assert that release of the requested record would inhibit the government's ability to collect SNAP data because participation in the SNAP program requires private parties to submit such data.

competitors would be given through access to certain documents, such as loan applications. *Id.*

Congress incorporated *National Parks*' interpretation of Exemption 4 through its enactment of the Government in the Sunshine Act, which provided an exemption to federal open meetings laws with the exact same language as FOIA's Exemption 4. *Compare* 5 U.S.C. § 552(b)(4) *with* 5 U.S.C. § 552b(c)(4). As the House Conference Report explained: "The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 552(b)(4), *and the conferees have agreed to this language with recognition of judicial interpretations of that exemption*." H. Rep. No. 94–1441, at 15 (Conf. Rep.) (emphasis added) (regarding the exemption similar to Exemption 4 in open meetings laws, 5 U.S.C. § 552b(c)). This statement was in clear reference to *National Parks*; the House of Representatives' summary of the companion bill explains that the exemption protects "commercial or financial material obtained from a person and privileged or confidential, *as interpreted in cases such as* National Parks & Conservation Assn. v. Morton." 122 Cong. Rec. 24,181 (1976) (emphasis added) (citation omitted).

Congress was thus aware of *National Parks*' interpretation of FOIA's Exemption 4 and approved of it when it created a new law with language identical to Exemption 4. *See id; cf. Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (explaining that when Congress uses "the materially same language in [a new statute], it presumptively

was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning"). This, coupled with the other 59 statutes that Congress enacted that either expressly incorporate Exemption 4 or use virtually the same language, *see* Resp. Br. 36–41, make clear that Congress intended for *National Parks* to govern disclosure requirements. *See Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

B. The *National Parks* standard is consistent with FOIA's foreseeable harm standard.

Under *National Parks*, commercial or financial information is considered "confidential," and may therefore be withheld under FOIA's Exemption 4, if its disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770. That standard comports with the current text of FOIA, adopted by Congress through enactment of the foreseeable harm standard in 2016. *See* 5 U.S.C. § 552(a)(8)(A). Indeed, in adopting the *National Parks* standard, the United States Court of Appeals for the First Circuit presciently described the "principle to be derived from *National Parks*[], and the cases which have followed it":

> [I]nformation will not be regarded as confidential under exemption 4 unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption.

9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 9 (1st Cir. 1983). Like *National Parks*, the plain text of the foreseeable harm standard requires the government to demonstrate (1) harm to an interest protected by a FOIA exemption—here, the competitive position of a third party—and (2) a reasonable likelihood that harm will occur. *Compare National Parks*, 498 F.2d at 770, *with* 5 U.S.C. § 552(a)(8).

The 2016 amendments to the Act include an unambiguous direction from Congress that a showing of foreseeable harm to an interest protected by a discretionary FOIA exemption *must* be made before records may be withheld. Thus, even if the Court does not adopt the *National Parks* test for Exemption 4 now, current and future FOIA requests will be governed by an essentially, if not entirely, identical standard. Indeed, as noted above, the Argus Leader can simply file a new FOIA request today that would require the Food and Drug Administration to apply the foreseeable harm standard. *See Spannaus v. Dep't of Justice*, 824 F.2d 52, 61 (D.C. Cir. 1987) (noting that parties can "simply refile [their] FOIA request tomorrow and restart the process").

IV. The public has a strong interest in understanding how the government spends tax dollars and contracts with private parties.

As Congress envisioned, journalists regularly use FOIA to inform the public about the actions of government. Access to records showing the government's interactions with third parties and how taxpayer dollars are spent is an important part of ensuring the public knows "what their government is up to," and further counsels in favor of a narrow reading of Exemption 4. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

For instance, the New Food Economy, a nonprofit newsroom, has used data from the SNAP program, similar to the data at issue in this case, to report which companies benefit the most from taxpayer-funded food subsidies. This data revealed that some of the largest beneficiaries of this federal program—aimed at supporting the nutritional needs of low-income families and individuals—were multi-billion dollar companies. H. Claire Brown, *Amazon Gets Huge Subsidies to Provide Good Jobs—But It's a Top Employer of SNAP Recipients in at Least Five States*, New Food Econ. (Apr. 19, 2018), https://perma.cc/3WG3-EBR3. As a result of the New Food Economy's reporting, the public learned that in some states, employees of Amazon, McDonald's, Uber, and Walmart benefited the most from the SNAP program. *See id.* In addition, the report showed which companies benefit from a United States Department of Agriculture pilot program that permits online grocers to accept SNAP benefits. *Id.*; *see also*

Leanna Garfield, *Amazon Will Soon Start Accepting Food Stamps*, Bus. Insider (Jan. 9, 2017), https://perma.cc/N84D-Q5JG. These SNAP records help the public fully understand how public dollars go towards meeting the nutritional needs of workers, as well as how some companies receive taxpayer dollars through SNAP benefit spending.

Access to these and similar SNAP records is necessary if the public is to fully understand how and where government money is spent, which in turn encourages public officials to represent the public's interest in overseeing such spending. Following the New Food Economy's article, a bill was introduced in the Senate that would tax large companies for any government benefits its employees receive, with the goal of ensuring that the government is not subsidizing the wealthiest corporations. *See* David Leonhardt, *Amazon's Surrender is Inspiring*, N.Y. Times (Oct. 3, 2018), https://nyti.ms/2UWSMxS. In response, Amazon, for example, increased its minimum wage to $15 and committed to lobbying for an increased federal minimum wage. *See* John Lauerman & Jeremy Kahn, *Bezos Blinks and Raises Amazon's Minimum Wage in U.S., U.K.*, Bloomberg (Oct. 2, 2018), https://bloom.bg/2GVfh30.

The public also has an interest in knowing what companies the government chooses to do business with. For example, reporters at Reveal from the Center for Investigative Reporting used FOIA to obtain EEO-1 reports of various government contractors, which included data about the race and gender of the contractors' employees, from the Department of Labor. *See* Will Evans & Sinduja Rangarajan, *We Got the Government to Reverse Its*

Longtime Policy to get Silicon Valley Diversity Data, Reveal (Nov. 15, 2018), https://perma.cc/YHM3-3VY4; *see also EEO-1 Frequent Asked Questions and Answers*, Equal Employment Opportunity Commission, https://perma.cc/L5CK-XUHR (last visited Mar. 24, 2019). The records showed that many technology companies that receive lucrative government contracts employ very few women or people of color. *See* Will Evans & Sinduja Rangarajan, *Oracle and Palantir Said Diversity Figures Were Trade Secrets. The Real Secret: Embarrassing Numbers*, Reveal (Jan. 7, 2019), https://perma.cc/K4R4-6EDR. For example, Palantir, which has received hundreds of millions of dollars in government contracts to develop technology for law enforcement entities, has no female executives and only one female manager. *Id.*

Many private companies that do business with the government are quick to assert that *any* disclosures in response to FOIA requests may cause competitive harm. For example, in response to Reveal's FOIA request, Palantir's counsel sent a letter to the Department of Labor, arguing that the disclosure of the EEO-1 reports would allow competitors to "identify changes in relative staffing levels," and thus that "*it may be possible* for a competitor to gain insight into how Palantir is staffing its workforce and modify its own workforce accordingly." Letter from Tammy R. Daub, Paul Hastings LLP, to Candice Spalding, Deputy Director of the Department of Labor (Sept. 29, 2017), https://perma.cc/G2VD-HN4W (emphasis added). Claims of competitive harm were even made by companies—such as Google or Apple—that now

voluntarily publicize their reports. *See Annual Report—Google Diversity*, Google, https://perma.cc/2VKT-FXZQ (last visited Mar. 3, 2019) (including latest EEO-1 report); *Inclusion & Diversity*, Apple, https://perma.cc/A6WH-2EZR (last visited Mar. 3, 2019) (same); *see also Black, Female, and a Silicon Valley 'Trade Secret,'* CNN (Mar. 18, 2013), https://perma.cc/44CJ-GH7Z (noting that many companies, including Google and Apple, often claimed that the information disclosed in EEO-1 reports would cause competitive harm).

The *National Parks* test, like the foreseeable harm standard, ensures that agencies do not withhold records without showing that disclosure will cause competitive harm to a third party. Application of the *National Parks* test has ensured that the public knows how government programs, like Medicare, are funded. *See, e.g., Biles v. Dep't of Health and Human Servs.*, 931 F. Supp. 2d 211, 222–28 (D.D.C. 2013) (holding that Exemption 4 does not apply to records relating to projected costs and revenue provided by private insurance companies in the Medicare Advantage or Medicare programs).

The *National Parks* test has also ensured that Exemption 4 was not improperly used to withhold details about government spending. During its investigation of the California electricity crisis of the early 2000s, *The Wall Street Journal* filed a FOIA request for an appendix based on Federal Energy Regulatory Commission employee interviews and investigations regarding whether two government contractors had manipulated electricity prices. *Dow Jones Co., Inc. v. Fed. Energy Regulatory Comm'n*, 219 F.R.D. 167, 171 (C.D. Cal. 2003) (noting prices had

gone from $63 to $750 per megawatt). The district court, relying on *National Parks*, held that the agency failed to meet its burden under Exemption 4. *Id.* at 178 (noting that the agency relied on the government interest prong). The released records helped the *Journal* inform the public about the California energy crisis. *See, e.g.*, Rebecca Smith, *Indictments Are Returned in California Reliant Case*, Wall. St. J. (Apr. 9, 2004), https://on.wsj.com/2T88wg6. As these examples demonstrate, access to records like those at issue in this case are critical to ensuring that the public is properly informed about how the government spends taxpayer dollars, and necessary for the public to hold government officials accountable to those they are elected to serve.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to dismiss the writ of certiorari as improvidently granted or, in the alternative, to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus requiring the Government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the requested information could be potentially useful to a competitor, or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share?

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 100 cases of great importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Exemption 4 of the Freedom of Information Act (FOIA) protects against disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). When the RLC's members disclose confidential information to the government, they rely on Exemption 4 to ensure that the confidential information will not be released to the

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[1] Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

general public. The Eighth Circuit's decision artificially narrows Exemption 4 by applying it only if disclosure is "likely to cause substantial harm to the competitive position of" the provider. Pet. App. 3a. Thus, even if a company can show that disclosure of confidential information would be harmful, the Eighth Circuit nonetheless requires disclosure so long as that harm does not meet the vague requirement of being "substantial." Worse, if a company concludes, and provides evidence, that disclosure of its confidential information is likely to cause substantial competitive harm, the Eighth Circuit's decision allows a federal judge to override the company's assessment—even though the company is in a far better position than the court to predict the competitive consequences of disclosure.

Exemption 4, by its terms, applies to *all* confidential information. Thus, if a company discloses information to the government but otherwise keeps that information confidential, Exemption 4 requires the government to respect the company's confidentiality decision. The RLC's members have a strong interest in ensuring that Exemption 4 is applied according to its unambiguous terms.

SUMMARY OF ARGUMENT

The Court should expressly reject "the rule favoring narrow construction of FOIA exemptions." *Milner v. Dep't of the Navy*, 562 U.S. 562, 579-80 (2011).

This Court has never articulated a principled basis for the narrow-construction canon. The canon appears to have originated in ill-considered dicta from a line of

D.C. Circuit cases from the early 1970s. In *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), this Court adopted the narrow-construction canon, citing only the D.C. Circuit cases in support. Subsequent cases have repeated the canon, but this Court has never explained its basis, beyond adverting to FOIA's supposed general policy in favor of disclosure.

That supposed general policy is an insufficient basis for inferring a narrow-construction canon. Last Term, this Court rejected a nearly identical narrow-construction canon for Fair Labor Standards Act (FLSA) exemptions. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). The employee argued that because the FLSA is generally intended to assist employees, exemptions to the FLSA should be construed narrowly. This Court disagreed, finding that the FLSA's exemptions should not be artificially narrowed based on policy concerns. Here, too, Exemption 4—and FOIA's other exemptions—should be applied according to their terms.

At a minimum, the narrow-construction canon should not be used to narrow an *unambiguous* statute. The Eighth Circuit expressly acknowledged that its interpretation of Exemption 4 deviated from the dictionary definition of "confidential," but it held that the narrow-construction canon gave it license to ignore the exemption's plain text. The Eighth Circuit erred in unapologetically rewriting a federal statute.

The Court should expressly repudiate the narrow-construction canon in this case. Even though *Encino* undermines the arguments in favor of the narrow-construction, lower Courts are nonetheless likely to

follow that canon unless this Court instructs them not to. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (lower courts are bound by Supreme Court's pronouncements, "[h]owever persausive" the arguments against them (quotation marks omitted)). That canon has a significant impact in lower-court FOIA litigation, including in cases involving sensitive law enforcement and national security materials. This Court rarely hears FOIA cases, so the opportunity to reconsider the narow-construction canon rarely arises. The Court should take the opportunity in this case to repudiate that canon and direct lower courts to interpret FOIA according to its terms.

ARGUMENT

The RLC agrees with Petitioner that Exemption 4 of FOIA applies to all confidential information, rather than a limited subset of confidential information that, in the view of a federal district judge, would cause "substantial competitive harm" if released. The Court should hold that "confidential" means "confidential," rather than arbitrarily narrowing Exemption 4 based on a generalized intuition that the more disclosure, the better.

The RLC writes separately to urge the Court to reject "the rule favoring narrow construction of FOIA exemptions." *Milner*, 562 U.S. at 579-80. The Eighth Circuit applied that rule in rejecting Petitioner's interpretation of Exemption 4. Pet. App. 4a n.4. Yet this Court has never articulated any principled basis for this canon, and none exists. Further, the canon improperly encourages courts to artificially narrow the

scope of unambiguous FOIA exemptions—as occurred in this case. This Court recently rejected a similarly unprincipled narrow-construction canon for FLSA exemptions. *See Encino*, 138 S. Ct. at 1142. Thus, as Petitioner suggests (Pet. Br. 32 n.19), this Court should reject the narrow-construction canon in this case as well.

I. This Court Has Never Articulated A Principled Basis For The Narrow-Construction Canon.

The narrow-construction canon for FOIA exemptions has humble roots. It appears to have originated in poorly-explained dicta from D.C. Circuit decisions in the early 1970s. This Court then imported the canon from the D.C. Circuit, citing the D.C. Circuit's dicta and offering no additional explanation. Later decisions of this Court have continued reciting the narrow-construction canon, eventually characterizing it as "oft-repeated" and "consistently stated." But this Court's sole support for this canon has been its own prior cases; it has never offered any principled explanation for the canon.

The narrow-construction canon appears to have originated in two D.C. Circuit cases by Chief Judge Bazelon: *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), and *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970). *Bristol-Myers* declared that "[t]he legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed," 424 F.2d at 938, while *Grumman* similarly asserted that "the Act requires that exemptions be

narrowly construed," 425 F.2d at 580 n.5. In support of this proposition, both cases cited the statute now codified at 5 U.S.C. § 552(d).[2] That statute, however, does not create a narrow-construction canon. It actually says the exact opposite: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.*" 5 U.S.C. § 552(d) (emphasis added). Thus, Congress insisted that courts follow the *specific* terms of the exemptions, rather than artificially altering them via a judge-made canon with no basis in the statutory text.

Nonetheless, after creating a narrow-construction canon out of whole cloth, the D.C. Circuit continued to invoke it, citing only its prior cases for support.

- In *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971), the D.C. Circuit asserted that Exemption 4 "is intended to encourage individuals to provide certain kinds of confidential information to the Government, *and it must be read narrowly in accordance with that purpose.*" *Id.* at 1078 (emphasis added). The court offered no additional explanation but inserted a footnote consisting of a string-cite of a Senate Report, a House Report, *Bristol-Myers*, *Grumman*, a district court case, and seven additional cases that do not mention FOIA, including two 19th-century cases. *Id.* at 1078 n.46.

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[2] At the time, the statute was codified at 5 U.S.C. § 552(c). *See Bristol-Myers*, 424 F.2d at 938; *Grumman*, 425 F.2d at 580 n.5.

- In *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), the D.C. Circuit recited the same canon, citing *Bristol-Myers* for support. *Id.* at 672.
- In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), the D.C. Circuit repeated the canon, citing *Getman*, *Bristol-Myers*, and a district court case that relied on *Bristol-Myers*. *Id.* at 823 & n.11.
- The *Vaughn* case later returned to the D.C. Circuit, and the court declared that it had "repeatedly stated" that exemptions must be construed narrowly. *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975). The court's support for this proposition consisted of *Soucie* and the first iteration of *Vaughn*. *Id.* at 1142 nn.23-24.

This Court first recited the narrow-construction canon in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). In that case, the Court stated that FOIA's exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* at 361. It then declared that these exemptions "must be narrowly construed." *Id.* Its sole authority for this proposition consisted of three of the D.C. Circuit cases cited above: the two *Vaughn* cases and *Soucie*. *Id.* The Court then offered a block-quotation from a prior case from this Court that did not recite a narrow-construction canon, but instead merely characterized FOIA as "broadly conceived." *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)). That block-quotation also cited a Senate Report that did not

endorse a narrow-construction canon either, but instead observed that "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Id.* (quoting S. Rep. No. 89-813, at 3 (1965)). No additional explanation for the narrow-construction canon was provided.

Rose was apparently sufficient to give the narrow-construction canon a foothold in the law. After *Rose*, this Court continued reciting the narrow-construction canon, citing only its prior cases and offering no additional explanation. The Court next invoked the narrow-construction canon in *FBI v. Abramson*, 456 U.S. 615 (1982). Even though *Abramson* was only the second time that this Court had mentioned the canon, the Court characterized it as "oft-repeated"—citing only *Rose* for support. *Id.* at 630. The canon appeared for a third time in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), in which the Court declared that "the mandate of the FOIA calls for broad disclosure of Government records," and thus asserted that "for this reason we have consistently stated that FOIA exemptions are to be narrowly construed." *Id.* at 8 (quotation marks and brackets omitted). Despite the assertion that this canon was "consistently" applied, the only two cases cited in support of this proposition were *Abramson* and *Rose*. *Id.*

Subsequent cases from this Court continued to characterize the narrow-construction canon as a consistently applied rule, citing prior cases in the jurisprudential chain. *See, e.g., U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (stating that

"these exemptions have been consistently given a narrow compass" and citing *Julian* and *Abramson*); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (similar, citing *Rose*); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 180 (1991) (similar, citing *John Doe*). In *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), this Court cast the narrow-construction canon as an "obligation," citing only *John Doe* and *Rose* for support. *Id.* at 181. More recent cases have continued to assert the canon and cite older cases without additional explanation. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citing *Tax Analysts* and *Abramson*); *Milner*, 562 U.S. at 571 (citing *Tax Analysts*, *Klamath*, and *Landano*).

To sum up, the narrow-construction canon has its origins in D.C. Circuit cases decided almost 50 years ago that relied exclusively on a statute reciting the exact opposite of a narrow-construction canon. A "canon" with such a weak legal basis is ripe for reconsideration.

II. There Is No Basis For The Narrow-Construction Canon.

This Court's sole justification for the narrow-construction canon has been the "basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361; *see Julian*, 486 U.S. at 8 (citing FOIA's "mandate" of "broad disclosure"). This general policy is not a sound basis for ignoring the plain language of a statute. This Court rejected a similar narrow-construction canon for FLSA exemptions in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134

(2018). The Court's analysis in *Encino* requires the same result for FOIA exemptions as well.

The FLSA is structured similarly to FOIA. FOIA imposes a general obligation for the government to make information available to the public, 5 U.S.C. § 552(a), subject to several enumerated exemptions, 5 U.S.C. § 552(b)(1)-(9). Similarly, the FLSA imposes a general obligation for employers to pay minimum wage and overtime pay to employees, 29 U.S.C. §§ 206, 207, subject to several enumerated exemptions, 29 U.S.C. § 213(a)(1)-(19) (exemptions to both minimum wage and overtime requirements), 29 U.S.C. § 213(b)(1)-(30) (additional exemptions to overtime requirement).

In *Encino*, this Court considered whether service advisors at car dealerships fell within the FLSA's exemption from the overtime-pay requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). The Court held that the exemption applied, reasoning that service advisors were "salesmen" who were "primarily engaged in ... servicing automobiles." 138 S. Ct. at 1140-41. The Court rejected the employees' argument that the exemption applied only to salesman who *sold* (as opposed to serviced) automobiles. *Id.* at 1141-42.

The employees also "invoked the principle that exemptions to the FLSA should be construed narrowly." *Id.* at 1142. This Court "reject[ed] the principle as a useful guidepost for interpreting the FLSA." *Id.* It explained that "[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give

[them] anything other than a fair (rather than a 'narrow') interpretation." *Id.* (quotation marks omitted). It noted that the "narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs," emphasizing that it "is quite mistaken to assume ... that whatever might appear to further the statute's primary objective must be the law." *Id.* (quotation marks, alterations, and citations omitted). The Court also observed that the FLSA has numerous exemptions, and "[t]hose exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* Therefore, this Court held, "we thus have no license to give the exemption anything but a fair reading." *Id.*

Identical reasoning requires rejecting the narrow-construction canon for FOIA exemptions. First, like the FLSA, FOIA "gives no textual indication that its exemptions should be construed narrowly." *Id.* (quotation marks omitted). To the contrary, FOIA instructs that exemptions should be construed according to their terms: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.*" 5 U.S.C. § 552(d) (emphasis added). Contrary to the 1970s D.C. Circuit cases in which the narrow-construction canon originated, this provision does not provide license to a federal court to interpret FOIA exemptions more narrowly than their text would dictate.

Second, although FOIA doubtless was enacted with the general purpose of facilitating disclosure of government information, it "is quite mistaken to

assume ... that whatever might appear to further the statute's primary objective must be the law." *Encino*, 138 S. Ct. at 1142 (quotation marks omitted). Just as the FLSA's exemptions "are as much a part of the FLSA's purpose as the overtime-pay requirement," *id.*, so, too, are FOIA's exemptions as much a part of its purpose as its general disclosure requirement.

Indeed, it is arbitrary to focus on FOIA's "mandate" of "broad disclosure," *Julian*, 486 U.S. at 8, as a basis for construing Exemption 4. One could just as easily say that *Exemption 4*'s "mandate" is one of broad protection for confidential information acquired from third parties, based on *Exemption 4*'s policy that FOIA should not harm the confidentiality interests of private parties who give financial information to the government. And by defining Exemption 4's mandate that way, one could just as easily say that Exemption 4 should be construed *broadly* to achieve that mandate. That reasoning is faulty, just as the reasoning underlying the narrow-construction canon is faulty. In reality, FOIA has multiple objectives, including not impeding the government from receiving confidential business information, and those objectives are reflected in both the disclosure obligation and the exemptions. All of Congress's objectives are best advanced by applying the statute as written. *Encino*, 138 S. Ct. at 1142 ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage" (quotation marks omitted)).

The narrow-construction canon also produces counterintuitive results with respect to other FOIA exemptions. For instance, FOIA Exemption 1 applies

to information kept secret "in the interest of national defense or foreign policy," while FOIA Exemption 7 applies to certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(1), (7). Under the narrow-construction canon, courts would assume that Congress intended to disfavor national security and law enforcement interests, and therefore that those exemptions should be construed narrowly. Yet there is nothing in the statutory text, or even in broad conceptions of policy, that would support judge-driven efforts to undermine national security and law enforcement efforts by artificially narrowing the scope of these exemptions.

Indeed, concerns about law enforcement interests led the D.C. Circuit to make the opposite error: to arbitrarily *broaden* the scope of a different FOIA exemption based on a perception that FOIA, as written, did not protect law enforcement interests well enough. Exemption 2 of FOIA protects materials "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), yet in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), *abrogated by Milner v. Department of the Navy*, 562 U.S. 562 (2011), the D.C. Circuit expanded that exception to apply to any materials that might risk "circumvention of agency regulations or statutes," in light of its assessment that Congress would not have wanted to undermine "the effectiveness of law enforcement agencies." 670 F.2d at 1074. This Court rejected that countertextual interpretation in *Milner*, explaining that *Crooker*'s interpretation requires "cutting out some words and

pasting in others until little of the actual provision remains." 562 U.S. at 573 (citation and quotation marks omitted). As *Milner* demonstrates, FOIA's exemptions should be construed based on what they say, rather than based on courts' intuitions about whether disclosure is good or bad. The same reasoning justifies eliminating the narrow-construction canon.

III. The Narrow-Construction Canon Is Especially Pernicious As Applied To Unambiguous Statutes Like Exemption 4.

At a minimum, the Court should reject the application of the narrow-construction canon in a case like this one, where the exemption at issue is unambiguous.

The application of the narrow-construction canon is even more troubling in this case than in *Encino*. In *Encino*, the employee did not argue that an unambiguous statute should be modified based on policy concerns; rather, he merely argued that a statutory ambiguity should be resolved in the employee's favor. In particular, the employee contended that the exemption at issue was ambiguous as to whether it applied only to salesmen who sold, or also to salesmen who serviced, and that the employee should prevail in light of that ambiguity. *Encino*, 138 S. Ct. at 1141-42.

Here, by contrast, the Eighth Circuit applied the narrow-construction canon to modify an *unambiguous* statute. The word "confidential" is not ambiguous. "Confidential" is an ordinary English word that carries a well-understood meaning: a document is

"confidential" if it is kept secret, regardless of whether its disclosure will cause competitive harm. *See* Pet. 18 & nn.11-12 (citing dictionary definitions of "confidential"). To be sure, there may be factual disputes as to whether a particular document actually *is* confidential—for instance, litigants may disagree about whether the document is customarily disclosed. But the *word* confidential is not ambiguous.

Yet the Eighth Circuit applied the narrow-construction canon nonetheless. It expressly rejected the argument that the word "confidential" should be construed according to its "dictionary definition[]." Pet. App. 4a n.4 (internal quotation marks omitted). It found this argument to be "precluded by the Supreme Court's admonition that FOIA exemptions must be narrowly construed." *Id.* (internal quotation marks omitted). It reasoned that if dictionary definitions were applied, "Exemption 4 would swallow FOIA nearly whole." *Id.* Thus, it applied a rule that has no basis whatsoever in the statutory text: the provider of the information must proffer evidence not only that the information is confidential, but evidence of "actual competition and the likelihood of substantial competitive injury." Pet. App. 3a (quotation marks omitted).

The Eighth Circuit's reasoning is pernicious because it opens the door for courts to alter FOIA to conform to their policy preferences. If the narrow-construction canon is merely a tool to resolve ambiguities, the canon will apply only in the limited subset of cases where a statute is genuinely ambiguous.

But if the canon can be used to alter unambiguous exemptions, it becomes much more powerful.

The Eighth Circuit applied the canon to rewrite Exemption 4, but courts could apply the canon to rewrite other exemptions as well. For instance, a court may disagree with Congress's policy judgment that information "related solely to the internal personnel rules and practices of an agency," or information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions," is exempted from disclosure. 5 U.S.C. § 552(b)(2), (8). Thus, a court could take it upon itself to narrow those exemptions only to documents that it deems, in its sole discretion, to be particularly sensitive—in contravention of those exemptions' plain terms.

At a minimum, this Court should clarify that, even if the narrow-construction canon applies in some contexts, it does not apply where there is no statutory ambiguity to resolve. Here, the word "confidential" is unambiguous and the statute should be applied as written.

IV. The Court Should Reconsider The Narrow-Construction Canon In This Case Because The Narrow-Construction Canon Has A Significant Impact In Lower Courts.

The Court should repudiate the narrow-construction canon in this case, rather than leaving the issue for another day. Admittedly, repudiating this

canon is not strictly necessary to resolve this case. As Petitioner correctly argues, the Eighth Circuit's interpretation is so plainly contrary to the statutory text that Petitioner should prevail regardless of whether there is a narrow-construction canon. Nonetheless, because the canon significantly affects lower-court litigation, but few opportunities for this Court to reconsider that canon arise, the Court should do so in this case.

Virtually any pronouncement the Court makes regarding FOIA will have a substantial practical effect, in view of the large volume of FOIA litigation, and the even larger volume of FOIA requests. Indeed, 228 FOIA lawsuits were filed in Fiscal Year 2018, an increase from 204 in Fiscal Year 2017.[3] Those lawsuits are only a tiny fraction of the more than 800,000 FOIA requests filed in Fiscal Year 2017 (the most recent year for which data is available), which resulted in 14,548 administrative appeals.[4] Courts and agencies are bound by this Court's interpretations of FOIA—including the narrow-construction canon. Thus, every time a court or an agency interprets FOIA's exceptions in the course of considering a FOIA request, it is required to interpret FOIA via a distorting lens that has no basis in the statutory text.

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[3] The FOIA Project, http://foiaproject.org/lawsuit/.

[4] Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2017*, at 4, 15, http://www.justice.gov/oip/page/file/1069396/download.

Further, the narrow-construction canon affects the outcome of FOIA disputes in the real world. Lower courts routinely invoke the canon in decisions ordering disclosure of documents, including in cases involving documents related to law enforcement and national security. *See, e.g.*, *ACLU of N. Cal. v. U.S. Dep't of Justice*, 880 F.3d 473, 482-83 (9th Cir. 2018) (requiring disclosure of materials addressing electronic surveillance and tracking devices); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 681-82 (D.C. Cir. 2017) (vacating decision exempting FBI correspondence related to public corruption investigation); *Lucaj v. FBI*, 852 F.3d 541, 549 (6th Cir. 2017) (requiring disclosure of documents shared between FBI and foreign government); *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 103, 111 (2d Cir. 2014) (requiring disclosure of documents related to targeted killings via drone strikes).

ACLU v. Department of Defense, 543 F.3d 59 (2d Cir. 2008), *summarily vacated by* 558 U.S. 1042 (2009), provides an illustrative example of the canon's practical impact. In that case, the requestor sought disclosure of photographs depicting treatment of detainees by United States soldiers in Iraq and Afghanistan. *Id.* at 63. The government sought to withhold the photographs under the FOIA exemption for law enforcement records that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). It contended that releasing the information could endanger the lives of American troops in the Middle East. 543 F.3d at 63.

The Second Circuit rejected this argument, holding instead that the exemption applied only if the government identified *specific* individuals who were endangered. *Id.* at 70. The court expressly stated that this interpretation was driven by the narrow-construction canon:

> The defendants' construction of "any individual" as not requiring the government to name or even roughly identify any individual ... is not a narrow one. The reading of "any individual" as requiring a FOIA defendant to identify an individual with reasonable specificity is a narrower construction, and to be preferred on that ground alone. ... [T]he principle that FOIA exemptions are to be construed narrowly cabins the permissible construction of the phrase "any individual." A construction that requires the agency to identify with reasonable specificity the person or persons who could reasonably be expected to be endangered accords with that principle. The defendants' unbounded interpretation does not.

Id. The Second Circuit's decision precipitated the passage of special legislation intended to protect the photographs from disclosure, and this Court vacated the Second Circuit's decision in light of that legislation. *Dep't of Defense v. ACLU*, 558 U.S. 1042 (2009).

The RLC does not take a position on how any of these cases should have been decided in the absence of a narrow-construction canon. Rather, the RLC merely emphasizes that the narrow-construction canon significantly affects FOIA litigation in practice.

Whether such canon remains good law is therefore an important issue that this Court should resolve.

Yet, although FOIA disputes are evergreen in agencies and lower federal courts, they rarely arise in this Court. The Court has heard only two FOIA cases since 2004, and none since 2011. *See Milner v. Department of the Navy*, 562 U.S. 562 (2011); *FCC v. AT&T Inc.*, 562 U.S. 397 (2011).

The paucity of FOIA cases does not reflect that FOIA is unimportant. Rather, it reflects that FOIA cases tend to present fact-specific disputes that do not lend themselves to Supreme Court review. The narrow-construction canon serves as a thumb on the scale that affects myriad disputes, but it is uncommon for such disputes to yield circuit splits of the sort this Court would grant certiorari to resolve.

Now, however, the Court has granted certiorari in a case that cleanly implicates the continued vitality of the narrow-construction canon. That canon was central to the Eighth Circuit's reasoning: as previously noted, the Eighth Circuit relied on the narrow-construction canon as its very basis for rejecting the dictionary definition of "confidential." Now that the question is squarely before the Court, it should not needlessly wait to address it.

Further, reconsideration of the narrow-construction canon is especially warranted because that canon is irreconcilable with *Encino*, yet lower courts are likely to abide by it absent a contrary pronouncement by this Court. As explained in Part II, *Encino*'s logic applies with full force to FOIA's narrow-construction canon.

Yet, this Court has repeatedly recited the narrow-construction canon, and lower courts must follow this Court's decisions until this Court holds otherwise. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (lower court was "correct" in following Supreme Court precedent despite its "increasingly wobbly, motheaten foundations" because "it is this Court's prerogative alone to overrule one of its precedents").[5]

Thus, this is not a problem that will solve itself. Lower courts will continue applying a clearly incorrect doctrine until this Court makes explicit what *Encino* already implies: there is no basis for a narrow-construction canon.

Stare decisis should not be a basis for preserving the narrow-construction canon either. "[*S*]*tare decisis* is not an inexorable command." *Wayfair*, 138 S. Ct. at 2096 (quotation marks omitted). The narrow-construction canon is a "false ... premise of this Court's own creation," and if that premise is not "accurate and logical," reconsideration is warranted. *Id.* at 2096-97. Moreover, the fact that the narrow-construction canon is not "clear and easy to apply," *id.* at 2097—but instead, alters ordinary statutory-interpretation

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[5] Given that the narrow-construction canon has been articulated solely through unreasoned dicta, lower courts may not be strictly bound by it. This is especially true given that *Encino* rejects all the arguments in favor of such a canon. Nonetheless, given that this Court has repeated the narrow-construction canon many times, lower courts are unlikely, in practice, to disregard it.

principles to an unpredictable extent—further counsels in favor of eliminating it.

Most importantly, there are few, if any, reliance interests in preserving a faulty canon of construction—as opposed to a settled interpretation of a statutory term. *See Wayfair*, 138 S. Ct. at 2098 ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."). The RLC does not advocate overruling any of this Court's interpretations of particular FOIA exemptions, even if the Court's reasoning in those cases may have been influenced by the narrow-construction canon, because stakeholders do rely on this Court's interpretations of FOIA.

But there are no analogous reliance interests associated with the narrow-construction canon. As applied to Exemption 4, no private party will have submitted information to the government in reliance on the narrow-construction canon. To the contrary, the narrow-construction canon would have made them more reluctant to submit information, because it increases the probability of disclosure. Similarly, as applied to other FOIA exemptions, the government would not have relied on the narrow-construction canon as a basis for including information in a document—if anything, the narrow-construction canon, which increases the probability that a document would be released, would make the government more guarded.

Nor could any member of the public claim reasonable reliance on the canon. First, no members of the public *do* anything in reliance on the narrow-construction canon. Perhaps the narrow-construction

canon increases the probability of a FOIA request being granted, but it is doubtful that the mere expectation of filing a successful FOIA request constitutes a vested interest on which a member of the public could reasonably rely. But even if it did, a member of the public could not reasonably rely on a canon of construction that merely puts a thumb on the scale, but does not resolve how any particular dispute will be decided. No one could reasonably expect that a particular document would be disclosed *because* of the narrow-construction canon. As such, repudiating the narrow-construction canon will promote evenhanded application of the law, without undermining the reliance interests that are the basis for *stare decisis*.

CONCLUSION

The Court should reject the narrow-construction canon for FOIA exemptions.

Respectfully submitted,

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